Supreme Court of the United States,

OCTOBER TERM, 1876.—No. 138.

PETER LYMAN,
Libellant and Appellant,

vs.

THE STEAMBOAT "JOHN L. HASBROUCK,"
ROBERT D. CORNELL ET AL.,
Claimants and Appellees.

BRIEF FOR APPELLANTS.

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THE STEAMBOAT JOHN L. HASBROUCK, Robert D. Cornell *et als.*,
Claimants and Appellees.

Brief for Appellants.

Statement of the Case.

This cause comes up on appeal from a decree made by the Circuit Court of the United States for the Eastern District of New York, September 23, 1874, affirming a decree of the U. S. District Court for the Eastern District of New York, dismissing the libel of the libellants and for the costs of the claimants, $260.20.

See Decree, Rec. p. 32, *fol.* 72.

The libellant, Peter Lyman, filed his LIBEL December 7, 1869, as owner of the sloop *Venus*, against the steam propeller

John L. Hasbrouck, to recover damages for the sinking of the sloop by a collision with the *John L. Hasbrouck*, on the Hudson River, near West Point, on the night of the 27th November, 1869, whereby the sloop was sunk and totally lost, to the damage of the libellant, $7,000. The LIBEL alleged the facts of the collision and charged that it was caused solely by the fault of those navigating the *Hasbrouck*.

See Libel, Rec. p. 1, *fol.* 3.

The ANSWER of the claimants, filed January 5, 1870, denied all the allegations of the libel charging fault on the *J. L. Hasbrouck*, and averred that the collision was caused solely by the want of skill and care of those navigating the sloop.

See Answer, Rec. p. 6, *fols.* 14–18.

At the hearing before the District Judge, June 23, 1870, the evidence disclosed the following leading facts:

On the night of the 27th November, 1869, the sloop *Venus*, owned by libellant, was on a trip down the Hudson river, bound from Catskill to Brooklyn, with a cargo of flagging stones.

She had on board Edward O'Brien, master, and three men, Burton, Johnson and Dolahan; all on deck, and two of them forward (*Rec. fols.* 22, 25, 27); she reached West Point about midnight; the night was cloudy, but not very dark (*Rec. fol.* 28). Lights could be seen at a distance of one-half to three-quarters of a mile (*Rec. fol.* 22); the sloop had her green and red lights both set and burning (*Rec. fol.* 33); she had taken in her mainsail and jib after leaving Newburgh, in the commencement of the Highlands. After getting round Magazine Point (above West Point), the sails were got up again; the mainsail was up, and the jib was swayed up just as the sloop was rounding West Point (*Burton, Rec. fol.* 25); the sloop was headed eastward, and after pasing West Point was, according to libellant's evidence, drifting with the tide (*Ib. Rec fol.* 26); there was little or no wind; "What there was was W. S. W., or W. (*O'Brien, Rec. fol.* 22; *Turner, fol.* 23; *Burton, fol.* 25; *Johnson, fol.* 27; *Dolahan, fol.* 27); the lights of the propeller were first seen on

the sloop as the sloop came round West Point, at a distance of about three-quarters of a mile; from the time the propeller's lights were first seen, the course of the sloop was not changed. (*O'Brien, fol.* 22; *Dolahan, fol.* 27; *Johnson, fol.* 27.)

The *John L. Hasbrouck* a steam propeller, was going up the river at a speed of seven or eight miles an hour, with a barge, the *Ulster County*, in tow, lashed to her starboard side. After passing Garrisons, she made the green light of the sloop, then had "a glimpse of her port light" which was immediately shut out again, and the pilot of the steamer then gave a sheer to the eastward, blew a whistle and stopped. (*Ans. Rec., fol.* 16.)

The lookout on the propeller saw the sloop, and saw her green light; before she showed the red light he ran up to the pilot house and helped put the wheel over; "*I saw her coming down round the point*; *I ran right up in the pilot house*; we began to sheer to eastward as soon as *I got up into the pilot house*; I was outside of the pilot house when I saw the *green light, and inside when I saw the red light.*" (*Herman, Rec., fols.* 33, 34.)

Almost immediately thereafter the collision occurred, the sloop's stem striking the propeller on her port side between 40 and 50 feet abaft her stem with such force that the bowsprit of the sloop was ripped out, causing her to sink in the channel. (*Rec., fol.* 21.)

The claimants gave evidence tending to show that at the time of the collision there was a fresh breaze from the northwest, and claimed that the sloop could have kept to the westward, also that the propeller had not time or room to avoid the collision. (*Clough, Rec., fol.* 28; *Herman, fol.* 34; *Bull's, fol.* 36; *Decker, fol.* 37; *Hill, fol.* 39; *Hopton, fol.* 41, *Bell, fol.* 44; *Squires, fol.* 48; *Cornell, fol.* 52; *Austin, fol.* 58.)

The District Judge decided that the collision was caused solely by the fault of the sloop. He held the *Venus* in fault for being out of her proper course and position; laying down as a special rule of navigation for the Hudson River at West Point, that a sailing vessel going down the river must, if she has sufficient wind, haul around the point on the west side, and leave the east side of the channel free for steamboats coming up the

river, and that as matter of fact on the weight of the evidence the sloop had a good working breeze from the northwest, thereby imposing on her the duty of keeping to the west side of the river so as not to permit herself to be carried over to the east side.

See Opinion of BENEDICT, J., 4 *Benedict's Reports*, p. 357, see pp. 361, 362.

The District Judge acquitted the propeller of any fault, on the ground that she was justified from the "glimpse" caught of the sloop red light in supposing that the sloop intended to pass to the west, and had neither time nor room to avoid the sloop after she indicated by shutting in her port light that she was going to the east instead of the west.

Opinion, pp. 363, 364.

A decree was accordingly entered dismissing the libel. *Decree*, Dec. 9, 1870. (*Rec., fol.* 59.)

On appeal to the Circuit Court the decree was affirmed by the Circuit Judge, who placed his decision solely on the grounds stated by the District Judge in his opinion.

See decision of WOODRUFF, J., *Rec., fol.* 67.

The libellant appealed to this court.

Petition of appeal, Rec., fol. 74.

ASSIGNMENT OF ERRORS.

The appellant assigns as errors:

First.—That there is no warrant for the attempted exception made in this case by the District Judge to the rule that a sailing vessel meeting a steamboat shall hold her course.

Second.—That the finding that the sloop *Venus* was unlawfully or improperly on the East side of the Hudson river at the time of the collision is wholly unsupported by law or by any competent evidence in the case.

Third.—That there was no such controlling evidence that the sloop had a good working breeze from the northwest as to justify the conclusions based on the evidence as to the direction of the wind.

Fourth.—That the court erred in finding the sloop in fault.

Fifth.—That the court erred in exonerating the propeller *J. L. Hasbrouck* from fault, and in not adjudging her solely in fault for the collision.

POINTS.

First.—The learned District Judge erred in charging fault upon the sloop for being in an "improper position," and for "being out of her proper course provided she had a good working breeze from the northwest." The proposition of the learned judge that "a sailing vessel in this locality" (*i. e.* on the Hudson river, rounding West Point) "does not hold her course, within the meaning of the law, when she changes from the west to the east side of the river," is wholly untenable. It is an arbitrary assertion of a supposed rule of navigation unsupported by statute, by decisions of the courts, or by the evidence in this case.

1st. The proposition assumes that the sloop held her course. This was the fact.

The evidence is explicit that the course of the sloop was not changed.

The Captain, O'Brien testified: "After I came round West Point I first saw the lights of the *Hasbrouck;* she must have been three quarters of a mile off. * * From the time I saw her lights good, to the collision, my course was not changed;" (*Rec., fol.* 22) "I didn't see the lights till I got round the point, and after seeing them didn't alter my course." (*Ib. Rec., fol.* 23).

The sloop was on her starboard tack, heading to the eastward (*Libel, Rec., fol.* 3; *Burton, fol.* 26).

Burton, first hand of the *Venus*, Johnson, the cook, and Dolahan, deck hand—all the sloop's company—fully confirm the captain (*See Rec., fols.* 25, 27).

This is not in conflict with the claimant's evidence, that the sloop's red light was momentarily in view. The answer alleges that the sloop was heading about southeast, and exhibited her starboard light, and then, "when she got around the point, she *exhibited a glimpse of her port light, and immediately shut it out again* (*Ans. Rec., fol.* 16).

Clough, the pilot on the propeller, testified, on cross-examination, "I told Cornell I caught a glimpse of the red light, and so I say now; I think the sloop ran about her length with the red light in view" (*Rec., fol.* 32). The sloop's length was 65 or 70 feet (*Rec., fols.* 32). Her speed as given by claimants lookout, was about the same as the propellers' (*Rec., fols.* 34). The propellors' speed was between 7 or 8 miles the hour (*Rec., fol.* 29). This would make the time occupied by the sloop in running her length less than 6 seconds.

Hopton, pilot of the *Ansonia*, a steamboat following in the track of the *Hasbrouck*, first saw the sloop's green light, then a green and red, and then a green. *It was so short a time that I saw a green and red light*, that I can't give the distance we ran (*Rec., fols.* 42, 43).

It is manifest that the appearance of the red light was only momentary, and was not due to any change of course on the part of the sloop. In rounding the point, though on an east course, the port light might easily have been exhibited for a moment with no change of helm.

2d. The rule of navigation, as stated by Judge Benedict, is, that "a sailing vessel in this locality does not hold her course, within the meaning of the law, when, without cause, she changes from the west to the east side of the river, rounding West Point" (*Opinion* by Ben., J. 361, 362). This is wholly unsupported by law, or by the evidence. There is no statute of the U. S., or of the State of New

York, requiring a sailing vessel, in rounding West Point, in any state of wind or weather, to hug the west shore, or keep in the middle of the channel, or prohibiting her from navigating in any part of the river; nor has any such rule ever been announced or applied in any adjudged case to be found in the reports. An attempt was made in the case of the *Niagara*, reported in 3 Blatchf., 37, to show a somewhat similar custom of navigation in the East River, above Corlies Hook, for vessels coming down in an ebb tide, to keep off in the middle of the river, &c., but it wholly failed (*See Opinion* of Nelson, J., in the *Niagara*, 3 Blatchf., p. 38.)

3d. There is nothing in this case to warrant the court in finding that there was any usage or custom of navigation on the Hudson River, as to the locality in question, which imposed on the sloop the duty of keeping in a certain "place in the river, and not to permit herself to be carried over to the east side."

(*a.*) No such defense is set up by the claimants in the answer (*see Ans. Rec., fols.* 14–18). The answer, verified by Cornell, one of the claimants, who was on board the propeller at the time of the collision, and who, according to his own evidence at the trial, follows the river (*Rec., fol.* 51), contains a minute specification of the faults of these navigating the sloop as respects their want of nautical skill, (*Ans. Rec., fol.* 17), but does not charge that they had placed the sloop in an improper position, or that she was out of her course. The libellant was, therefore, not apprized of any such defense by the answer, and it is fair to assume that no such usage was known to claimants, or in fact existed.

(*b.*) The evidence failed to show any such usage or custom, or any custom as to sailing vessels ascending the river, having the force of a rule of navigation.

Clough, the second pilot of the *J. L. Hasbrouck*, who was at the wheel, gives the course of steamboats ascending the river at West Point (*Rec., fol.* 32). He does not pretend that there was any usage, custom, or rule for sailing vessels coming down the river. Squires, the first pilot (22 years'

experience on the North river), is silent on this point (*Rec., fols.* 48, 50). Two of the claimants, Wickes & Cornell, were on board, and neither of them testifies on this subject (*Rec., fols.* 51, 52), nor does Bullis, a boatman for seventeen or eighteen years, nor Decker, a boatman for twelve or fourteen years; Austen, pilot of the ferry boat at Garrison for seventeen years, testifies fully as to the course of boats going up, but not a word as to vessels coming down (*Rec., fol.* 58).

Peter Hill, sloop captain, testified on direct: "With the wind S. W. or W. S. W., a vessel would not be on her proper course if 200 feet from the edge of the channel abreast of the draw (*i. e.* draw-bridge on the Hudson River R. R., above Garrisons), she would not be on her proper course, if the wind was N. W. (*Rec., fol.* 39). On cross-examination: "A sloop with the wind N. W. has no business to be within 200 feet from the edge of the channel off West Point; she has plenty of room to westward, and should keep about the middle—about that; *I should not think it unusual though* to meet a vessel coming down there to the east of the middle, with the wind N. W." (*Rec., fol.* 40). On re-direct: "I have met vessels on the east side of the river, at that place, with the ebb-tide and N. W. wind. There might have been several vessels, *and some would be taken there;* there is not room for them" (*Rec., fol.* 41). On re-cross: "I don't know as I ever met a single vessel to the east there with the wind N. W.; I would think a vessel would be out of her course if I saw her there; I would think there was something the matter with her if I saw her there" (*Rec., fol.* 41). On re-direct: "I mean that I should think she had a master who didn't understand his business" (*Rec., fol.* 41).

Hopton, the only other witness who speaks to this point, says: "With that wind and tide the course, if properly taken, would bring a sailing vessel round there *best* to westward, the middle of the river certain" (*Rec., fol.* 41.)

This testimony is confined to the opinions of the witnesses—it does not prove any usage or custom. As to the course of steamboats, the evidence is of their "usual"

course (*Clough, Rec., p.* 15, *fol.* 32: "*The usual course*," &c. *Hopton, Rec., fol.* 43: "*The usual course for all steamboats*," &c.) But there is not a syllable of evidence as to any usage or custom of sailing vessels. The individual opinion of two witnesses as to what they think the best mode of navigation under certain conditions specified by them, is no evidence of usage.

"A usage to be binding should be definite, uniform and well known. It should be established by clear and satisfactory evidence."

Bowling v. *Harrison*, 6 How., 259.

There was, therefore, no basis for the rule of navigation declared by the district judge as the law governing the movements of the sloop. Its declaration and attempted enforcement in this case was an arbitrary and unauthorized act. The sloop was free to pursue her course on the river at West Point as at all other places according to the ordinary rules of navigation, and the court had no more right to impose a new or special rule upon her than it would have had to impose upon a party a sentence unauthorized by law.

Third.—The new rule of navigation which the learned District Judge sought to create was one which, according to his own statement of it, depended upon the direction and force of the wind. The evidence as to the wind, fairly stated, did not establish the applicability of the supposed rule, even if the rule had any existence prior to its statement in 4 Benedict.

1st. The court fell into a grave error as to the number of witnesses testifying to a wind favorable to the rule, and as to the character of other evidence on this point, The opinion says, "the question of the wind is, therefore, a material question in the case, and it has been so treated. Some twenty witnesses have been called to testify in regard to it, and their evidence discloses the ordinary conflict so characteristic of this class of cases. The weight of the evi-

dence is, however, clearly with the respondents. Some *seventeen* witnesses support the view of the respondents upon this point, to *five* or *six* upon the other side, and mere numbers must sometimes be considered."

When mere numbers are to be considered, there should certainly be "a fair count." Instead of "*some seventeen witnesses*" supporting the view of the respondents to "*five or six on the other side*," the fact is that only seventeen witnesses, in all, testified as to the wind, and out of these only twelve can be claimed as supporting the view of the respondents.

One of claimant's own witnesses on this point, Austin, a ferryboat pilot at Garrison's for seventeen years, says:

"It is a bad country to tell the direction of the wind. None of us can agree as to the wind within a mile of each other there. There are so many valleys and turns that the wind follows them" (*Rec., fol* 57). This witness lived below Garrison's, at least a mile from the collision (*Ib*).

This is true of all winding and narrow rivers or lakes, land-locked by high, steep and broken hills, as is the Hudson at West Point.

The evidence of all on the sloop was, that there was little or no wind at the time of the collision, and what there was was W. S. W. or west (*O'Brien, fol.* 22; *Burton, fol.* 25; *Johnson, fol.* 27; *Dolahan, fol.* 27). Turner, watchman on the Hudson R. R. R., who was on the shore and heard the collision, says: "There was very little wind, not enough to steer a vessel below the point" (*Roe, fol.* 23). This is not contradicted, as the District Judge supposes, but corroborated by the record kept at the West Point Hospital (not "barracks," as stated in opinion) a little north of Garrison's landing. This record shows that at 9 P. M. on the evening of the collision the wind was S. W., and at a strength of 3°, indicating "a slight breeze." Next morning, at 7 A. M. it was N., at a strength of 3° (*Rec., fol.* 55). This is all the record shows. The opinion states that the record shows that while the wind was light from the southwest in the evening before the collision, "it also shows that before morning it changed to the westward." This is

wholly mistaken. There is no such record, and nothing to indicate whether the wind, when it ceased blowing from the S. W., died out, or how it went round to the north. Another fact overlooked by the court is, that if there had been a strong wind from the N. W., as testified to by some of claimant's witnesses, it is impossible to account for the short distance ran by the sloop between the time when she first saw the lights of the propeller and the time she was struck. The best evidence as to the strength and direction of the wind is that of those on the sloop, whose movements were dependent upon it.

See the Genesee Chief, 12 How., 443, p. 46.

2d. Whatever view may be taken of the conflicting evidence as to the wind, it is certain that it was not of such a character as to justify the court in making it the basis of a rule of navigation improvised in this case as the ground of condemning the sloop.

Fourth.—The evidence failed to show that the sloop was, at the time of the collision, actually outside of the limits prescribed by the learned District Judge as the only proper area of navigation on the Hudson river, at West Point, for a sailing vessel with a working breeze bound down the river.

The channel is 500 yards wide—"a good boating channel, plenty of room"—(*Goldsmith, Rec., fol.* 21). The whole width of the river, by chart, is 1,960 feet; by measurement, 1,945 feet. The spot where the sloop sunk was ascertained by measurement to be distant 872½ feet from the east shore, and 1,072½ feet from the west shore. The sloop had not "permitted herself to be carried over to the east side" (*Opinion, p.* 363). She was lawfully and properly in the channel, and near the middle of it.

Fifth.—The propeller was in fault, and the learned District Judge erred in not holding her responsible for all the damage caused by the collision.

Out of the twenty-two witnesses examined in the cause, only six were witnesses of the movements of the sloop and propeller from the time the vessels made each other's lights to the time of the collision. Four of these six, viz.: O'Brien, Burton, Dolahan and Johnson, were called by libellant, and two, viz., Abraham Clough and Frederick Herman, were called by claimants. A fair view of the evidence will demonstrate that the propeller was guilty of fault, either—

(1.) In not seeing the sloop until just at the instant of collision. Inefficient lookout; or—

(2.) If she did see the light at any earlier period in not taking the proper measures to avoid the sloop. Improper manœuvres; or—

(3.) In stopping directly in the course of the sloop and laying still till she "came down foul" of the propeller.

1st. Abraham Clough, pilot of the propeller, testifies that he saw the lights of the *Venus* north of West Point Light, and to west of it as he looked *across* the point, *not over the point* (*Rec., fol.* 28). An inspection of the chart will show that the propeller must have been close to the east shore, and at least half way between Garrisons and West Point Light to have enabled Clough to see the schooner's lights to the north and west of the light on the point. From Garrisons to West Point Light is $\frac{6}{8}$ of a mile by the chart, and Clough's point of observation was therefore barely $\frac{3}{8}$ of a mile from the *Venus* when he saw her. He says further, that when he saw her he saw a green light (*Rec., fol.* 29). Herman, who was the lookout on the propeller, says he first saw the *Venus* coming around the point, and that he "ran right up in the pilot house" to give Clough a hand at the wheel, and that the pilot (Clough) blew the

whistle before he went into the pilot-house (*Rec. fol.*, 34), and that the pilot was putting the wheel over when he went into the pilot-house (*Ib.*). Clough says he did not put the wheel over "but a little, might have put it over a turn on the wheel. It takes four and a half or five turns to put it hard over" (*Rec. fol.* 30). That the collision came before he had time to put the wheel hard over, is shown by the testimony of Bullis, a passengers on the barge *Ulster County*, in tow of the propeller, who says he heard the propeller blow her whistle, which Herman says was before he went into the wheel-house (*Rec., fol.* 35). Bullis came on deck "immediately, and before he got on deck the vessels had struck"; he walked from ten to fifteen feet before the blow (*Bullis's Rec., fol.* 36. "*When the whistle blew I started; while I was coming out the bell rung, vessels had struck when I came on deck, and had not got up on the deck before the collision, I walked from ten to fifteen feet before the blow * * I felt the blow before I reached the stairs*").

Herman the lookout, testified that he was on the bow of the *Hasbrouck*, (*Rec., fol.* 33), and Clough testifies that her pilot-house is forty-two feet abaft her stem (*Rec., fol.* 29). Estimates of time and distance are uncertain, but the sequence of events furnishes a trustworthy method of fixing a period of time. Between the making of the lights of the *Venus*, and the collision, could have been hardly a minute. Herman makes the lights, and immediately goes a distance of less than forty feet to the pilot-house, during which time the pilot blows his whistle, and when Herman gets into the pilot-house he finds the pilot already putting the wheel over; the whistle was blown before Herman got into the pilot-house (*Rec., fol.* 34, *p.* 16, "*the pilot blew the whistle before I went up into the pilot-house*" * * * "*He was putting the wheel over when I went into the pilot-house.*") Bullis had time, after he heard the whistle, to go only ten or fifteen feet when the collision came. Decker, a witness from the barge *Ulster County*, confirms the testimony of Bullis. He says: I was about midships of the *Ulster County*. I heard the *Hasbrouck* whistle, I went up forward, and then I heard the bells to stop. I opened the

slide door; I saw the sloop coming right into us, about a length or a length and a half off (*Rec., fols.* 37, 38). The discovery, therefore, of the lights of the *Venus*, the whistle, the putting the helm over, the ringing to stop, and the collision, all occured in as near as can be estimated by witnesses' narrative of events, in about a minute.

2d. The *Hasbrouck* was guilty of fault in porting when the *Venus* was showing a green light, and so sheering herself right across the course of the sloop.

(*a.*) The answer of the claimant states that the schooner was discovered to the westward and northward of the light (*i.e.* West Point Light), and at the time "she was headed about southeast, and exhibited her starboard light, and then when she got around the point she exhibited a glimpse of her port light, and immediately shut it out again, and the pilot of the steamer then gave a slight sheer to the eastward to give the sloop a clear way in the channel;" and then, finding that the sloop was hauling more to the eastward, and continuing her course directly across the river, toward, and right for the steamer, the said pilot blew the whistle, and then stopped the engine." (*Ans. Rec., fols.* 15, 16).

By the express averment of the answer it will be seen that the sheer to eastward was *after* the red light had shut in, and when the green light was in sight. By the testimony of Herman, it is shown that the sheering to eastward was *before* the red light had appeared, and while the green light was in sight. He says: "I was outside the pilot house when I saw the green light, and was on the pilot house when I saw the red light. * * The pilot blew the whistle before I went into the pilot house, and "whenI went into the wheel house he was putting the wheel over. I went into the wheel house to give him a hand to put the wheel over, just as hard as we could to get her bow to eastward" (*Rec., fol.* 33 and 34). So also, though Clough denies that he ported till the red light appeared, and says that he blew the whistle when the red light shut off (*Rec., fol.* 32); he is directly contradicted in this by Herman, and by the an-

swer; and he himself says, he cannot swear that he didn't tell Mr. Haskett, proctor for claimant, that they made the sheer *after they shut in the red light* (*Rec., fol.* 31). It is clear, however, that at the moment the red light showed, if it did show, it was too late to avoid a collision. The answer says, there was a "glimpse of a red light," and Clough says, the *Venus* must have run her length (65 or 70 feet) (*Rec., fol.* 32) showing her red light (*Rec., fol.* 31). This would take about five or six seconds at his estimate of the speed of the *Venus*, about six or seven miles an hour (*Rec., fol* 30), and when the red light shut off, the pilot says: "I blew my whistle; I had then a little sheer to eastward, and I couldn't break it * * * We couldn't have sheered to westward after the whistle blew, in time to clear the sloop. Couldn't have sheered a point to westward by any use of the helm" (*Rec., fol.* 32).

(*b.*) The fatal manoeuvre of porting was adopted while the green light was in sight and was the cause of the collision. Had the *Hasbrouck* starboarded when the green light was first seen, it is certain there would have been no collision, and had she starboarded even when she ported, it is probable that she would have passed the schooner in safety.

3d. The *Hasbrouck* was guilty of fault in stopping when and where she did. Had she not done so, the *Venus* would have passed in safety under her stern.

Clough, the pilot, says, "When I saw the red light I hauled the steamboat more to the eastward, worked her to eastward all I could. I made no other change of course. I think she was between two and three hundred feet off. We laid still till she came down foul of us!" (*Rec., fol.* 29.)

This piece of evidence is wholly at variance with the testimony of the lookout Herman, and cannot be reconciled with it, nor with his own testimony; and so the District Judge held while excusing the pilot with a leniency strongly in contrast with the harsh measure meted to the sloop and her company. "Doubtless, some of the estimates of distance

given by the pilot would indicate that he had more room; but estimates of distance can never be relied on in this class of cases, and they should not control his positive declaration that when the sloop, by shutting in her port light, indicated that she was going to the east, there was neither time nor room to enable him to avoid her by sheering to the west." (*Opinion, pp.* 364, 365.)

4th. That the *Hasbrouck* was guilty of negligence which produced the collision, is made still more apparent by the fact that the pilot first saw the lights of the *Venus* when and where he says he did, *viz.* : to the north and west of the light, showing that he was much nearer abreast the light at West Point than he admits, and the statements of Bullis, Herman and Decker show that the collision happened quite near the centre of the river, for it is incredible that in the short space of time between the discovery of the lights by the lookout (and he must be assumed to have seen them at least as soon as the pilot) and the collision, the *Venus* could have come from a point to the north and west of West Point light to within fifty yards of the east shore of the river.

The testimony of Goldsmith, Turner and Pease, showing that the *Venus* sunk about the middle of the river, supports the inference drawn from the testimony of Bullis' Decker, Abraham Clough and Herman and others, that the allegation of the answer as to the place of collision cannot be supported.

(*See Rec., fols.* 21, 53, 54.)

5th. If the place of the collision is incorrectly stated in the answer, the question of the wind is no more an excuse for the fault of the propeller than it is a proof of the fault of the sloop. It is wholly immaterial in either view. If the propeller did not make out the lights of the sloop till just before the moment of collision, the question of the wind is equally immaterial whatever was the position of the sloop, as in that case her position did not mislead them or contribute to the collision. If those on the propeller were

watching the lights of the sloop for some time prior to the collision, and with the green light in view and after the momentary glimpse of the red light was lost, adopted a manœuvre which resulted in the collision, then the wind and the position of the sloop are alike immaterial. If the propeller, after observing the sloop's course, stopped and lay still when the sloop was 200 or 300 feet distant from her, and waited until the collision occurred, neither the wind nor the position of the sloop are material, because they neither induced or prevented such stopping. If, as already shown, the *Venus* being under sail, had a right to go in such part of the river as she chose, and if she kept her course, as assumed by the District Judge, the propeller was bound to keep out of her way, and the evidence shows that she might have done so.

6th. The sloop did nothing to embarrass any effort made by the propeller to avoid the collision.

Assuming the sloop to have been lawfully where she was, nothing is urged against her except the momentary glimpse of her red light. There is nothing to contradict the positive testimony of all on board the sloop that her course, was not changed (*Rec., fols.* 22, 25, 27). That this glimpse of the red light did not and could not affect the movements of the propeller has been shown already. The green light was in view at all times, save about five or six seconds. Clough, the pilot, saw it from the time he first saw anything of the sloop, except during that brief space (*Rec., fol.* 29). Herman, the lookout, saw it until he went into the wheel-house, and the pilot was already putting the wheel over, and not till after that did he see the red light (*Rec., fol.* 134). In the opinion of the court below, the showing of the red light is treated as a deliberate change of course by the sloop before the porting of the helm of the propeller, and as inducing that manœuvre at a time when it was too late after the green light reappeared to make any other manœuvre. Neither the answer nor the evidence support such a theory.

Sixth.—The plain rules of law applicable to this case are, that the sloop had a right to keep her course and the propeller was bound to avoid her. It was the duty of the propeller to adopt such precautions as to avoid the collision, and if she failed to do so, she was *prima facie* chargeable. Even if the sloop changed her course the propeller was not free from fault unless she used all reasonable exertion to avoid the danger. If the propeller neglected to starboard her helm when she ought to have done so, and if she could thereby have avoided the collision, it is no defense to say that nothing could be done at the moment of the disaster.

The Fannie, 11 Wall, 238.
The City of New York, 1 Cliff., 75.
The Carroll, 8 Wall., 302.
The Metis, 4 Ben., 120.
The Sunnyside, 1 Otto, 208, p. 210.
The Free State, *Ib.* 200.
The Isaac Newton, 18 How., 581.

Seventh.—The decision below proceeded upon a false issue, not raised by the pleadings or supported by the evidence.

It was based upon an assumption as to the rules of navigation, which has no basis in law or fact. It involved grave errors of statements as to certain material portions of the evidence. It rested on erroneous inferences from other portions of the evidence. It ignored controlling and undisputed facts. It made the direction of the wind "conclusive of the case" to condemn the sloop, whereas that fact was wholly immaterial. It made the momentary and casual glimpse of the sloop's red light conclusive to exonerate the propeller, whereas that circumstance is shown to have had no controlling influence on her movements. It is, as we respectfully submit, in clear violation of the established rules of law applicable to the case, and

contrary to the evidence. This being the case it should be reversed.

The Lady Pike, 21 Wall., 1.

Eighth.—The decree should be reversed, and the cause remanded to the District Court, with directions to enter a decree in favor of libellants against the propeller.

EDGAR M. CULLEN,
Proctor for Libellants.

T. E. STILLMAN.
WM. ALLEN BUTLER,
Advocates.

U. S. Supreme Court.

PETER LYNAN,
Appellant,

vs.

The Steamboat "J. L. HASBROUCK,"
ROBERT D. CORNELL, *et. al.*,
Claimants and Appellees.

No. 138.

BRIEF AND POINTS FOR APPELLEES.

The libellant appeals from a decree of the Circuit Court for the Eastern District of New York, affirming a decree of the District Court, which dismissed the libel in the cause.

The libellant was owner of the sloop "Venus," which was sunk on the night of November 27th, 1869, by a collision with the propeller "John L. Hasbrouck," which occurred in the Hudson River, off West Point, well over to the eastern side of the river. The sloop was bound down the river. The steamboat was bound up the river from New York to Poughkeepsie.

The river, at West Point, makes a sharp turn from a course east south-east, to a course south south-west. Steamboats going up the river, on an ebb tide, as was the case on the night in question, keep a course well on the east side of the river till they are abreast of the Point and can see what is in the reach of the river above.

The pilot of the "Hasbrouck" was pursuing this course as he approached the Point about midnight of the night in question. When he was about an eighth of a mile above Garrison's (which is on the east side of the river, about a mile below West Point. See chart) he saw the greenl ight of the sloop as she came in view off West Point (fol. 28). He kept on, hauling a little further to the eastward, and saw the red light of the sloop come in view, which indicated to him that the sloop was heading down the river, as she was bound to do, so that she would pass to west of him. Shortly afterwards, however, the red light shut in again, indicating that the sloop was changing her course across the river. The propeller then had a sheer to the eastward on her which was difficult to break, as she had a barge alongside on the starboard side. The pilot at once whistled as a signal to the sloop to call attention, and sheered his boat as hard as he could to east, and stopped her. The sloop, making no change in her heading, ran right across the river and struck the propeller in the side, head on, breaking off her own bowsprit and sinking shortly after.

The opinion of the District Court, dismissing the libel, is reported in 4 Benedict's Rep., p. 359. We have also attached it to this Brief. The opinion of the Circuit Court simply approves of the grounds set forth by the District Judge (fol. 67). The decree of the District Court was rendered Dec. 9, 1870. It was affirmed Feb. 25, 1873 (fol. 67), the final decree in the Circuit being entered September 23, 1874, (fol. 71).

FIRST POINT.

We apprehend that there can be no doubt as to the rules of law which should have governed the navigation of these vessels.

1. The steamboat was bound to keep on the east side of the river, as she approached West Point. The evidence that this is the usual course of navigation is undisputed.

   Abraham Clough, fol. 32.
   Hopton, fols. 42–43.
   Austin, fol. 57–58.

2. If the wind was fair, the sloop as she passed West Point was bound to head down the river, instead of across it. That should be the Rule of the Road under such circumstances, without any evidence. And such is the undisputed evidence.

   Hill, fols. 39, 40 and 41.
   Hopton, fol. 42.
   Bell, fol. 44.
   C. Clough, fol. 45.

And so both the Courts below have held.

SECOND POINT.

The sloop had a fair, working breeze.

a. The issue on this point in the pleadings differs somewhat from the contradiction in the evidence.

In the pleadings the issue is, whether there was a very light wind from the south-west, as the libel alleges, or a good breeze from the north-west, as the answer alleges.

In the evidence the issue is made, whether there was any wind at all.

b. The libellant's four witnesses from the sloop testify that there was substantially no wind, and that the sloop was "drifting." (O'Brien, fol. 22; Burton, fol. 25; Johnson, fol. 27; Dolahan, fol. 27.)

The only evidence to support them is that of Turner (fol. 23) who shows, however, nothing to fix the wind in his memory, and very little to show that he knows anything about the collision at all.

The record of observations kept at West Point (fol. 55) shows only that at 9 P. M. there was a slight breeze from S. W. This is not the slightest evidence that there was not a heavy blow at midnight, which was the time of the collision (O'Brien, fol. 22).

c. The libellant's evidence shows facts entirely inconsistent with this claim that there was no wind.

1. They admit that it blew hard just above (fol. 25), so that they *took in all sail.*

2. When they got round Magazine Point (see chart) they got up the mainsail *to the reef* (fol. 25). This of itself shows that there was no calm.

3. The captain told the pilot of the "Hasbrouck" that his sloop "wouldn't luff" (fol. 22), or he "couldn't make her luff" (fol. 30). If there had been no wind he would certainly have said there was none.

And the allegation in the libel is that the sloop was "*sailing* on the starboard tack east, south-east" (fol. 3).

d. Against this contradictory, incredible and feebly supported story, the claimant furnishes this body of evidence.

1. The four witnesses on the "Hasbrouck" testify that the wind was northwest, and blowing a stiff breeze. They are the two pilots, A.

Clough (fol. 28, 30, 31), and Squires (48), Herman, the lookout (fol. 34), and Captain Cornell (fol. 52).

Mr. Wickes, who was also on the "Hasbrouck," testifies that the wind was strong and blowing down the river, though he does not give its direction (fol. 51). Two other witnesses on the barge "Ulster County," which was alongside of the "Hasbrouck," disinterested, except so far as being attached to her may give them an interest of feeling, tell the same story (Bullis, fol. 35, 36; and Decker, fol. 37).

And it is to be borne in mind that after the collision the "Hasbrouck," was stopped, and lay stationary near the place of collision for quite a time, and that the question of the wind was up, at the time of the conversation with the captain and first hand of the sloop about her not luffing.

2. Moreover these seven witnesses are powerfully corroborated by the evidence of five witnesses entirely disinterested (Hill, fol. 39; Hopton, fol. 41; Bell, fol. 43, 44; C. Clough, fol. 45; and Austin, fol. 57, 58). Hill was master of a sloop coming down the river; Clough, pilot of the "D. S. Miller," bound down; and Austin was the ferryman at West Point. The other two were pilots of steamboats bound up.

3. It is also proved by A. Clough, the pilot of the "Hasbrouck" (fol. 28), Herman (fol. 34), Bullis, the passenger on the "Ulster County" (fol. 36), and Bell, the pilot of the "Tom. Powell" (fol. 36), that other sailing vesse

were going down the river that night—some of them say *two-reefed.*

Moreover, Hill the master of the "Livingston, had to anchor at Caldwell's just about this time, because it blew too heavily (fol. 39).

4. The force and character of the blow is also conclusive as to the force of the wind. No vessel, borne by the tide alone, which must affect both vessels alike, could have thus penetrated the side of the "Hasbrouck" at right angles, (Dow, fol. 33, A. Clough, 29).

From all this evidence it seems that this Court must sustain the finding of the two Courts below, that the libellant's story as to the wind, is not the true one, but that instead of drifting down the river helpless, the "Venus" was coming down and across the river, borne by a fresh working breeze, at a rate of 6 or 7 miles an hour. (Bullis, fol. 361, Clough, 30).

THIRD POINT.

This brings up the second main point of controversy in the case, viz; Did the "Venus" change her course?

The witnesses who speak on this point, from the "Venus", are O'Brien, Burton and Dolahan; from the "Hasbrouck", Clough and Herman, and from the "Ansonia," Hopton.

a. The Court will notice that O'Brien's evidence is only that the course of the "Venus" was not changed after he "saw the lights of the 'Hasbrouck' *good*", (fol. 22). But when that was, and where the "Venus" was then, and where the "Hasbrouck" was, in no way appear from his evidence. There is nothing in it to contradict the hypothesis that

after having headed down the river, she changed to cross it, and never changed after. And in that case the fact that she did not change, is a fault instead of a virtue.

Furthermore, great doubt is thrown upon the correctness of this statement of O'Brien's by his swearing that he saw several changes in the course of the "Hasbrouck" (fol. 22). She made but one, viz., swinging off to East. If he saw what seemed to be changes by her, they are likely to have been in fact, changes by the "Venus." If he did not, what becomes of his evidence?

b. Burton and Dolahan, who support him on this question were both forward, and swear that they were looking at the "Hasbrouck" all the while. They are therefore, not competent to speak as to the course of their own vessel.

Furthermore, each of these witnesses swears that he saw the three lights of the "Hasbrouck", and *saw no change in them*, (fol. 26 and 27). But they must have changed, and the green light have gone out of sight.

If the witnesses did not see a change which took place in the object at which they *were* looking, they are not very much to be relied on to prove that there was no change in an object at which they were *not* looking.

Burton also is shown to be unreliable. He contradicts himself as to whether the jib was up or the lights seen *first* (fol. 26). He is proved to have contradicted himself on the night of the collision, as to the position of the crew. (Crapser 47, Squires 49, Cornell 52.

c. On the other hand the witnesses from the "Hasbrouck" and the "Ansonia" all testify to what they saw. They saw the green light first, and then, for a space longer or shorter, they saw both lights, and then the red light went out and the green remained visible till the collision.

If they saw this (and whatever may be said about Clough and Herman as to their being interested, confused or unreliable, no criticism can be made against Hopton), there can be no doubt but that the "Venus" changed her course so as to go down on the west side, and afterwards changed again to the east. No other manœuver would account for the change of the lights.

d. If the libellant should claim the benefit of the rule that witnesses as to what occurred on their own vessel are more to be credited, we say, that the rule does not apply when it is a question of the appearance or disappearance of a light. From the nature of things, witnesses on another vessel must be entitled to more credit on this point than those on the vessel which carries the light. The positive testimony in such a case is that of the witnesses who swear that they saw the light.

e. The attempt of the libellant's counsel to explain away the evidence of Hopton by supposing that he saw the red light *after* the collision, is ridiculous.

Hopton says that he saw the green light of this vessel come around West Point; that then he saw the red light come in view and again go out, and afterwards the green light; that the green light *went to the eastward* and then disappeared, and then the "Hasbrouck" went over to the west side of the river (fols. 42, 43).

But the sloop did not go to the eastward *after* the blow. She sunk to west of the "Hasbrouck." And the "Hasbrouck" did not go to west till after she sunk.

It is plain that if Hopton's story is correct, the fact that the "Venus" changed her course and ran across the river out of her track and into the "Hasbrouck" is established.

FOURTH POINT.

As bearing upon this question of a change of the "Venus'" course to eastward, the locality of the collision becomes important. For if it was well over on the eastern shore, that of itself is a strong proof that the "Venus" changed. Her true course around West Point would, by the testimony of all the witnesses who speak on this point, have carried her far below.

Hill, 39; Hopson, 42; Bell, 44; Clough, 45.

a. It is to be noted that on this question of locality we had no evidence at all from the "Venus" when the libellant rested, and we still have none except from Button, though why he should have been taken up to identify the place, rather than the master, who should have known best, is a question for the libellant to answer.

All the libellant's evidence on this point is as to the position of the spar, which came up in June, 1870, (fol. 21), *seven months after the collision*, and which the libellant assumes to have been the mast of the "Venus," and assumes to indicate the place of the collision. There is no proof whatever that it was the "Venus'" mast, and no proof that the "Venus" sunk where she was struck, but the contrary. And in that steep cleft, where as the chart shows, the bottom has a rapid slope to a depth of 150 feet, through which the mighty cur-

rents of the Hudson pour, it would be a most violent assumption to rely upon that mast as any evidence of the place of this collision.

b. On the other hand, we have first the fact that the course of steam vessels, bound up as the "Hasbrouck" was, is on the east side—"within a stone's throw of Boat House Point," says Hopton (fol. 43), and that the "Hasbrouck," in his view, went up in that course and he followed her (fol. 42-43). Secondly, she is proved to have sheered to East. How much is not positively stated, and could not be; but her pilot sheered her over as far as he dared, (fol. 29). Thirdly, the evidence of her witnesses, places her over within about a length of the east side of the channel, which, with a barge on the starboard side and the wind N. W., was as near as was safe (fols. 29, 34, 35, 36, 43, 47, 48, 51, 52). Fourthly, she was very near to a schooner at anchor on the east side—not the width of a barge from her after the blow (Crapser, fol. 48), and the schooner was not anchored in the channel, of course. Fifthly, the charge that the sloop was too far over to east is proved by the witnesses of the "Hasbrouck" to have been made again and again that night, and not a man from the "Venus" ventured to deny it. (Clough, fol. 30, Bullis, 35; Crapser, 47; Squires, 49; Wickes, 51; Cornell, 52).

These things all combine to show that the "Venus," after coming round the Point and heading down enough to show her red light, bore off to the eastward under her jib and reefed mainsail, instead of running down the river, and crossing it struck the "Hasbrouck," nearly at right angles. If she did this she is clearly in fault.

The "Free State," 91 U. S. Rep., p. 204.

FIFTH POINT.

Was the "Hasbrouck" in fault also? Her pilot was pursuing the proper course up the river on the east side. He had the right to suppose that the "Venus," coming down with that wind, as soon as she could lay her course fairly down the river, would do so. And it was his duty to keep his boat on the east side, and his right to rely on the "Venus" doing what, by her showing him her red light, she told him she was doing. That was *the course* of the "Venus," which she was bound to keep.

Even when she did leave that course and come over to east, he could not assume that she would continue that wrong course, and therefore attempt to go west of her. He had the right still to assume that the sloop would, before she reached his vessel, betake herself to right courses again. Especially was this so, after he had sheered over to east, for with the barge on his starboard side and the wind on his port bow, a sheer to port must have been slow, and would only have increased the danger.

It may be that if he had not slowed and stopped there would have been no collision, though at the rapid rate at which the "Venus" was coming, it is very doubtful whether he could have got by her. Slowing and stopping is so imperatively commanded by the law, that the Courts would be very slow to declare that precaution to have been a fault.

SIXTH POINT.

The libellant's counsel charge that the propeller was in fault for not sheering to the west, when the red light of the "Venus" went out of sight.

The Courts below have found that there was not time for her to make that sheer after the red light disappeared. And this conclusion is well sustained by the evidence.

A. Let us consider, in the first place, what would be reasonable and natural for the pilot of the "Hasbrouck," under the circumstances.

He would carry his vessel more to the east as he approached West Point. He would see the green light of the "Venus" as she came down in the middle of the river. He would recognize the duty of the "Venus" to keep that course, changing her helm as she got round the point. As she changed her helm he would see the red light come in view. He would then keep on his eastward course, knowing that as long as the red light remained in view the vessels could not come together. Then when he saw the red light go out of sight he would naturally blow one whistle, to call the attention of the "Venus" to the presence of the propeller, and to the fact that he was steering to east. And then, as soon as he saw that no change was made by the "Venus," and that there was danger of a collision, he would stop and back.

B. Now his evidence shows that this was exactly what he did. We quote from his evidence:

> "I saw her green light. I kept along up to eastward. After I got along up aways I saw a red light; shortly after they shut it in, and directly I saw *the red light shut in* I gave them a whistle; I saw they kept bearing off to eastward, didn't alter their course, and I stopped" (fol. 29). "When I saw the red light I hauled the steamboat more to eastward" (fol. 29).

"I blew the whistle when the red light shut off; we then had a little sheer to eastward, and I could not break it" (fol. 32).

C. In considering the question whether the pilot had room enough to sheer to the west after the red light shut off, the Court will of course notice the following portions of the pilot's testimony:

"When the red light went out of sight they were one-quarter of a mile from us; I couldn't tell exactly" (fol. 29).

"It might have been two minutes, or near that, before I slowed; I might have gone within an eighth of a mile before I slowed; I slowed and stopped all at once, as quick as I could pull the bells" (fol. 32).

But the Court will bear in mind how very unreliable these estimates, either of time or distance, are.

And the Court will see from other portions of the pilot's testimony, that neither could the distance have been a quarter of a mile, nor the time two minutes:

"I think she was between two hundred and three hundred feet when we stopped" (fol. 29).

"After the whistle blew, I couldn't have sheered so as to go westward of her" (fol. 33).

"We couldn't have sheered to westward after the whistle blew in time to clear the sloop. I am sure we could not have sheered a point to westward after the whistle, by any use of the helm" (fol. 33).

D. We are not left, however, to pick out from these varying estimates of the pilot, the one which was most probably correct. We have the positive

evidence of three witnesses, as to the time between the whistle and the blow. Bullis, a passenger on the "Ulster County," was sitting in the cabin; he heard the whistle and came on deck *immediately*. The bells rung while he was coming out, and when he came on deck, after walking ten or fifteen feet, he felt the blow (fols. 35, 36). Decker, the mate of the "Ulster County," heard the whistle when he was "about midships of the barge"; he went right forward to the slide, he heard the bells before he reached the slide, and when he opened the slide the sloop was about a length or a length and a half off (fols. 37, 38). Cornell, the master of the "Hasbrouck," was called out by the bells, and ran about forty feet, "being nearly out of the saloon at the blow" (fol. 52). And Wickes was waked by the whistle, got up when he heard the bell, shoved up the window, looked out, and saw the sloop just as she struck. (fol. 51).

The evidence of these four witnesses as to what they did, shows that the time must have been *very short*, and fully sustains the pilot in his judgement that there was not time to sheer to the west.

E. And further, it is clear that, as the sloop was coming down in the middle of the river, the time between her shutting out her red light and the collision, would be the time which it would take her to run from the *middle of the river*, to the place of collision. This distance would not be over 100 feet, if the place of collision was where the libellant would have it, (fol. 54), as it clearly was not. It would not be over 400 or 500 feet, if the collision was over where the claimant's witnesses place it, 400 or 500 feet from the railroad, (Clough, fol. 29). Give the sloop a speed of only 3 miles through the

water and with the tide 3 miles, (fol. 30), and she would run over 500 feet in a minute.

F. The libel and the crew of the "Venus" all agree that when the propeller sheered to east, the vessels were very close to each other. (Libel, fol. 4, Burton, fol. 22, Dolahan, 27).

SEVENTH POINT.

But it is said, the propeller should have backed. It is possible that if she had backed there would have been no collision, though it is more likely that the sloop would have in that case been brought down upon the bows of the steamboat or the barge. The burden is upon the libellant to establish to the satisfaction of the Court, that it was so plain at the time that backing would avoid the collision, that the pilot was negligent in not backing. But it is plain that the libellant has not established any such thing. Both Courts below were satisfied to the contrary, and this Court, in order to reverse their decision, will require something more than "doubts raised by the ingenuity of counsel."

The Hypodame, 6 Wall., 223.
The Quickstep, 9 Wall., 669.

EIGHTH POINT.

The libellant invokes the benefit of the rule that a steamer shall keep out of the way of a sailing vessel. But he can only invoke that by himself complying with the rule that the sailing vessel shall keep her course. Now it cannot be denied that if this sloop had kept the course down the river, on which she was, when she showed her red light to the "Hasbrouck" and the "Ansonia," no collision would have taken place. Her

change from that course, and the failure of the "Venus" to luff and go on her proper course, as she could have done at any moment before the collision, was the cause of the collision.

And after she had made that change of course, it was so manifest, so easy and simple a mode of avoiding the collision to turn her own head down the river, that she must be held inexcusable for not having adopted a precaution which the most ordinary seamanship would have dictated. (Rule 24.)

What the failure was caused by, whether by the ignorance of her master or the refusal of the vessel to answer her helm, which was the excuse that he gave for it on the night of the collision, makes no difference in the case. The collision was caused by that failure, and the burden of it should rest on the libellant and not on the claimant.

The language of this Court, in the case of the "S. B. Wheeler" (20 Wallace, 386), is singularly applicable to the case in hand:

"Questions of fact only are presented by this appeal. There is no dispute as to the law. Two Courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burden is on the appellant to show the error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here."

The same result, viz., an affirmance of the decree, should follow.

R. D. BENEDICT,

Of Counsel for the Appellee.

OPINION OF THE DISTRICT COURT.

THE STEAM PROPELLER "J. L. HASBROUCK."

BENEDICT, J.

This action is brought to recover the value of the sloop "Venus," and her cargo, which vessel was sunk by a collision in the Hudson River, on the night of the 27th of November, 1869.

The locality of the collision was off West Point, where the river makes two sharp turns in quick succession, one at Magazine Point above, and the other at West Point below. The time of the collision was about midnight, but lights could be seen at a distance of one-half to three-quarters of a mile. The tide was running strong ebb. The "Hasbrouck" was a propeller bound up the river, at a speed of from seven to eight knots; the "Venus" was a sloop, bound down the river with a cargo of stone. The vessels came in contact a little below the light at West Point, the bowsprit of the sloop striking the port side of the propeller about forty feet abaft the stem, nearly at right angles, whereby the sloop was so injured that she sank almost immediately. No other vessels were passing at the time, to interfere with the movements of either vessel. Both vessels were displaying the required lights, which were seen as soon as possible, when the lights of the sloop opened around West Point. The sloop was then about in the middle of the river, and not quite down to the point, while the propeller was about one-half a mile below the point, coming up on the east side of the river.

The allegation of the libellants is, that the sloop was sailing on the starboard tack, east-southeast, with the wind southwest very light; that the propeller approached to within fifty feet of the sloop, heading for the sloop's fore-rigging, when, on being hailed to go under the sloop's stern, she sheered off to the east across her bow, and in passing

caught the sloop's bowsprit, which was taken out by the force of the blow, and the sloop thus caused to sink.

The allegation of the respondent is, that the wind was northwest, blowing a good stiff breeze; that the sloop, when seen a little above West Point, was exhibiting her starboard light; that as she got around the point, she exhibited a glimpse of her port light, and immediately shut it off again, when a slight sheer to the east was given to the propeller, and finding the sloop to be hauling more to east, and across the river, the propeller was stopped, and while motionless was struck by the sloop. And it is charged, that the sails of the sloop were not properly and fully hoisted, and her jib was furled, and therefore she was unable to luff, and so ran across into the propeller.

In order to a correct determination of the points of difference between these parties, it is necessary to bear in mind the locality of the accident, and the proper course of navigation in passing West Point, as to which there is no room for dispute.

For a steamer, bound up the river on an ebb tide, the true course is, as she approaches West Point, to keep well to eastward, until able to see above the point, then to haul over, passing near the point when above it, so as to give a wide berth in passing Magazine Point above, by which course vessels coming down are seen at the earliest moment, and easily pass in safety, if they keep to the westward side, or middle of the river, as they round West Point.

Such being the well-known course of navigation at this point, it was the duty of the sloop in the present instance, if she had a working breeze to enable her to do it, to haul around the point, and allow the steamer to pass her to east. This she did not do; on the contrary, at the time the vessels came in contact, the sloop was well over to the east side of the channel. The sloop therefore was in fault for being out of her proper course, provided she had a good working breeze from the northwest, to enable her to keep her place,

as the claimants allege that she had. A sailing vessel in this locality does not hold her course, within the meaning of the law, when without cause she changes from the west to the east side of the river rounding West Point.

The question of the wind is therefore a material question in the case, and it has been so treated. Some twenty witnesses have been called to testify in regard to it, and their evidence discloses the ordinary conflict so characteristic of this class of cases. The weight of the evidence is, however, clearly with the respondents. Some seventeen witnesses support the view of the respondents upon this point, to five or six upon the other side; and mere numbers must sometimes be considered. But the libellants' own evidence contains facts strongly corroborative of the respondent's statement, in respect to the wind. For instance, the record of the wind, kept at the barracks at West Point, while it shows that at 9 P. M. of the evening before the collision the wind was light from the southwest, also shows that before morning it changed to the westward. When it changed is shown by the testimony of the first hand of the sloop, that when the sloop entered the Highlands the wind blew hard enough to compel them to take in their sails. Furthermore, this same witness says, that they again made sail after they passed Magazine Point, but with a reef in the mainsail. Hoisting a reefed mainsail within a short distance from the place of collision, clearly shows that there was plenty of wind at the time of the collision. So also the master of the sloop is proved to have stated, in accounting for the collision, that his sloop would not luff, and he himself admits the repeated use of that expression, which implies the presence of wind. A sailor would not have used such an expression to excuse the action of his vessel, unless there had been a wind.

In addition to these facts, derived from the evidence of the libellants, there is the testimony of the pilot of the ferry-boat at Garrison's, a witness wholly unconnected with the

controversy, who was at his house at Garrison's, and was awakened in the night by his wife because his window had broken loose, and getting up to make it fast, found the wind blowing heavily; likewise the testimony of the pilot of the "Thomas Powell," a witness equally free from connection with these parties, who landed at Cold Spring about 11 P.M., and recollects having to stop for a small boat under sail, and who says the wind at that time blew heavily. In view of such a mass of testimony it is impossible to believe the statements of the crew of the sloop, when they say there was no wind. On the contrary, it must be held that the sloop had a good working breeze. This fact in regard to the wind, being found against the libellant, is conclusive of the case. With a wind which would enable the sloop to keep her proper course, she is found at the time of the collision well over to the east side of the river, and presenting her starboard side broadly to a vessel bound up. Such a course on the part of a sailing vessel at West Point, in a fresh breeze from the northwest, cannot be justified. Not that the sloop was bound to change her course to avoid the propeller, but because she was bound in passing that point to keep her place in the river, if possible, and not to permit herself to be carried over to the east side, in the track of a steamboat which was pursuing the ordinary and only safe course to pass that point. Whether this action of the sloop arose from ignorance, or from carelessness, or from some defect in her rigging, which made her refuse to obey her helm, is immaterial, so far as the liability of the propeller is concerned. The propeller is not responsible for the improper position of the sloop.

There remains to consider whether the propeller was guilty of negligence in omitting any effort within her power to avoid the sloop; for notwithstanding she had the right to suppose that in such a breeze the sloop would not attempt to go over to the east side, and to take her course accordingly, still, when she saw that the sloop was going

over to east, it was her duty to avoid her if she could do so. It has accordingly been most earnestly contended that the propeller must be held in fault, upon her own answer, for sheering to the east instead of to the west, after she saw that the sloop was going over to east.

The zeal with which this feature of the case has been pressed, by an advocate of such large experience in matters of this kind, has led me to weigh with all possible care the evidence in the case bearing upon this point in connection with the answer; but I am constrained to say that I cannot agree to the conclusion which the libellant seeks to draw. The answer, indeed says, that after the sloop got around the point she exhibited her port light, and immediately shut it in again, and the pilot of the "Hasbrouck" then gave a slight sheer to east, then blew one blast of his whistle, and then stopped his boat. But if it be true that this sloop, with a working breeze, approached the point showing her starboard light, and when below the point, showed her port light to the propeller, then coming up to east of her, and then shut out the port light, all of which is proved, it would not follow that the propeller was bound to sheer to west, unless it also appear that there was room to do it after the red light shut off. Up to that time the propeller was well justified in supposing, and indeed bound to suppose, that the sloop was intending to pass down to west. The statement of the pilot of the propeller is, that there was not room to sheer to west after the port light shut off, and this statement is entirely consistent with the answer, and it is also supported by other evidence, which appears to me to be entirely controlling.

Doubtless some of the estimates of distance given by the pilot would indicate that he had more room; but estimates of distance can never be relied on in this class of cases, and they should not control his positive declaration that when the sloop, by shutting in her port light, indicated that she was going to the east, there was neither time nor room

to enable him to avoid her by sheering to west. This statement of the pilot derives confirmation from the evidence of the first hand of the sloop, who says that when the propeller sheered to east she was very close to the sloop. To the same effect is the testimony of Dolahan, also a witness of the libellant, who says the propeller was pretty nigh on the sloop when she sheered to east. The proximity of the vessels is clearly and indisputably shown by the testimony of Decker, the watch on the barge "Ulster County," which was being towed up alongside of the "Hasbrouck," a witness wholly unconnected with the navigation of the propeller. This witness was standing midships on the barge when he heard the whistle of the propeller, which was blown when the red light shut off. He at once started forward, and when he reached the slide, some twenty feet from where he stood and looked out, the sloop was close at hand, within a length or a length and a half of the propeller. The testimony of Bullis, who was below on the "Ulster County," also indicates the short space of time between the whistle and the blow; and, finally, the libel gives the distance of the vessels apart at this time as about 50 feet. It is, therefore, impossible to hold the propeller in fault for omitting to sheer to port, or for omitting to stop and back in time. So long as the sloop was to west of her, and showing a red light, the propeller was not called on to do either. When the red light was shut off she was too near the sloop to do anything more than she did.

My conclusion, therefore, is that the collision in question was not caused by any fault on the part of the propeller; and accordingly, the libel must be dismissed, with costs to be taxed.

U. S. Supreme Court.

JOHN LYNAN,

vs.

The "JOHN L. HASBROUCK."

BRIEF FOR APPELLEES IN REPLY.

FIRST.—Appellant's counsel, in his first point, says that the proposition of law which the District Court laid down, that "a sailing vessel in this locality does not hold her course when she changes from the west to the east side of the river," assumes that the sloop held her course, which, he says, was the fact.

But the proposition assumes no such thing. On the contrary, the proposition is entirely consistent with the fact, that the sloop first undertook to pass down on the west side and thus showed her port light to the steamboat, and then changed to go to the eastward. And that such was the course of her navigation was the finding of the District Court. (See Opinion, Ante., p. 21.)

SECOND.—The appellant endeavors to maintain that the sloop made no such change. He appreciates the force of the fact that the sloop exhibited her red light, and endeavors to account for it as follows:

> "It is manifest that the appearance of the red light was only momentary, and was not due to any change of course on the part of the sloop. In *rounding the point*, though on an east course, the port light might easily have been seen for a moment with no change of helm." (Brief, p. 6.)

But, in the first place, on the theory of no change of direction by the sloop, there was no *rounding* of the Point at all. Her course above the point, she says, was E. S. E. If she *rounded* the Point she did not keep that course. And the use of this word by counsel is an involuntary admission that the sloop did just what we claim she did.

Again, the sloop was heading when above the Point E. S. E. The propeller was heading N. N. E.; and she was on the east side of the river, and a long distance below the Point. In this position, if the sloop did not change her course, the red light could not be seen until the propeller was *directly ahead of the sloop.* This would be at the instant of collision, for the blow was only 42 feet aft of the "Hasbrouck's" stem (fol. 38), and the red light then seen would *remain in view.* It was not *then*, therefore, that the red light was seen by Clough, Herman and Hopton; and till then it was entirely impossible for it to be seen without a change of course on the part of the sloop.

The case then is one in which the District Court discredited the evidence of O'Brien, the captain of the sloop, that he did not change his course, and gave credit to Clough, Herman and Hopton. This Court will hardly find reason for coming to a different conclusion.

THIRD.—The appellant attacks the rule of navigation laid down in the opinion of the Court as applicable to this sloop, that she should have gone down on the west side of the river, instead of crossing to the east side.

He says it is not law, is not alleged, and is not proved.

a. The rule is good law. Vessels coming down the river ought as far as possible to take the west side of the river.

"The west side is the natural and ordinary track for descending vessels."—NELSON, *J.*

The "Vanderbilt," 6 Wall, p. 227.

Steamboats going up must take the east side. The rule ought to be that all vessels coming down should take the west side, where they can.

b. The answer in this case alleges that the propeller was struck while "on the east shore." It denies that the sloop kept her course, and alleges that she "hauled more to the eastward," and "continually altered her course," till she struck the steamer. If this does not say that the sloop was out of her course, it seems to me difficult to frame language to that effect.

c. The evidence showed, without dispute, that it was improper navigation for the sloop to go over to the east side instead of passing to west.

Three witnesses, Hill, Bell and Hopton, one a sloop captain and the others steamboat pilots of large experience, both on steamboats and sailing vessels, testify to it; and they are entirely uncontradicted on this point, as to which, if their evidence was wrong, the libellant could have taken testimony both in the District and the Circuit Court.

The libellant took issue in both Courts on the question whether the Sloop did so change. But on the question whether, if she did, her navigation was improper, he has left the evidence of Hill and Bell and Hopton still uncontradicted.

This Court will hardly, without evidence, decide contrary to them.

d. The case of the "Niagara," (3 Blatch. 37), is in no way analogous to this case. It is not easy to see how the

fact that in that case an attempt was made to prove a custom for a vessel coming with the tide in the East River, near Corlear's Hook, to go to the left, which attempt failed on the evidence, makes that case an authority for the proposition that in the Hudson River, at West Point, a vessel in the same circumstances may properly go to the left.

FOURTH.—The appellant claims that perhaps the pilot of the propeller did not see the sloop "till just at the instant of the collision" (p. 12).

But inasmuch as there is not a particle of evidence to show that the pilot did not see the light of the sloop when he says he did, viz.: when she was north and west of West Point light (fol. 28), and as the appellant concedes that that was at least three-eighths of a mile (it was probably nearly five-eighths, see chart) it is difficult to see what this claim of "inefficient look-out" is based. The pilot certainly could not be expected to see *through* West Point.

FIFTH.—Appellant claims that the pilot was in fault "in porting when the sloop was showing a green light."

But this must depend upon the position of the vessels and the proper course of navigation for the sloop. If the propeller was well on the eastern shore, and the proper course of the sloop was to pass down to the west of her, it was certainly the duty of the pilot to give her a free channel, which his porting gave her. To have starboarded would have been to cross the course of the sloop; for no one pretends that the sloop was ever so near the eastern shore as the propeller was; and such crossing would certainly have been claimed to be the more dangerous course if it had been adopted and a collision had occurred.

SIXTH.—As to the point urged by counsel in the Courts below, that the propeller was in fault because she did not starboard when the red light went out of sight, which position was referred to and answered in our sixth point, (Ante., p. 11) it has been now abandoned. The appellant's brief does not allude to it except by the remark that if she had done so "it is probable that she would have passed the schooner in safety" (p. 15 [*b*]).

SEVENTH.—The appellant claims that the collision took place in the middle of the River; but the evidence shows plainly that it was far over to the east shore.

a. The libel does not allege that it was in the middle of the river; but the answer does allege that it was "over on the east shore, about abreast of the draw on the railroad between the tunnel and the mainland, and 200 feet therefrom." (Fol. 16).

b. No man on the sloop was asked where the collision took place.

c. The evidence for the propeller is strong to show that it took place far over to east, within a very short distance of a schooner which was lying at anchor just by the draw.

> "We were between 400 and 500 feet from the railroad, I should think, when she came foul of us—that is 150 or 200 feet from the edge of the channel." (Clough, fol. 29).
>
> "At the collision our vessel was about two lengths from the east shore; I mean from the east land." (Herman, fol. 34).
>
> "She was two or three lengths from the railroad track, and about her length from the edge of the channel." (Bullis, fol. 35).

"It was not a length from the side of the barge to the edge of the channel." (Decker, fol. 37).

"I saw the Hasbrouck go up on east shore. * * * * I was on a straight course right behind her. * * I go so close to east shore at the boat house point that we could throw a stone ashore. * * The course I was on at Garrison's would carry me on this course." (Hopton, fols. 42–43).

"Saw schooner's topmast on the starboard side to eastward. * * * The schooner lay right between us and the shore; I could have tossed a biscuit on her, I think; there was not room for another barge to lay between our barge and her." (Crapser, fol. 48).

"We were about 230 feet from the edge of the channel." (Squires, fol. 48).

"I saw the schooner at anchor; she lay between us and the railroad, not over the width of the barge from us, on our starboard side." (Squires, fol. 49.)

"Close on the east shore." (Wickes, 51.)

"Pretty well to the east shore." (Cornell, 52.)

d. And there is nothing against this except a measurement as to a spar not shown to have belonged to the "Venus," which came up seven months after the collision in a part of the river where many vessels lie sunk. (Muller, 56.)

e. In such a state of the evidence, this Court would hardly reverse the finding of the District Court that the sloop at the time of the collision was "well over to the east side of the river." (Opinion, p. 20.)

R. D. BENEDICT,
Counsel for Appellees.

No. 29 3-412
October T'm
No. 731

In the Supreme Court of the United States.

SAGE *et al.*,

INTERVENORS, APPELLANTS,

vs.

The Central Railroad Company of Iowa *et al.*,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

Brief of Argument of Appellees *sur* Motion to Vacate *Supersedeas*.

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Supreme Court of the United States.

Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Appellants,

vs.

The Central Railroad Company of Iowa et al., *Appellees.*

October Term, 1876.

No. 731.

APPEAL FROM CIRCUIT COURT FOR THE DISTRICT OF IOWA.

BRIEF OF ARGUMENT FOR MOTION.

This is a motion on behalf of the appellees, asking the court to vacate and set aside an order made on the 16th of February, 1876, by the Hon. Samuel F. Miller, judge of the Circuit Court for the District of Iowa and associate justice of this court, granting a petition exhibited by the intervenors, appellants, for an appeal to operate as a *supersedeas* from decree of the Circuit Court of Iowa, rendered the 22d of October, 1875, foreclosing a mortgage on the property,

franchises, and estate of the Central Railroad of Iowa, and ordering a sale thereof as therein specified. As appears by the record herewith submitted, this decree was entered, complete in all its terms and provisions, October 22d, 1875.

It is true that the appellants having asked leave early in January, 1876, to intervene in the cause, for the purpose of taking this appeal and also to set aside this decree, now undertake to appeal as well from the order of the court made January 14th, 1876, as from the decree of October 22d, 1875; but this order of January 14th, 1876, is in no respect the subject of an appeal. It was confined to a refusal to set aside the previously entered decree, and being, therefore, in the nature of a decision on a motion for a new trial, was a matter solely in the discretion of the court below, and, therefore, by long-settled course of decision, not the subject of appeal; and the only other matter covered by it was allowing the intervenors to become parties for the purpose of taking an appeal. They certainly cannot appeal from this order because it was in their favor, and without it they would have no status to come here at all. Further, if a *supersedeas* be sustained on an appeal from the order of January 14th, 1876, it would be of no possible effect, if proceedings were to go on under the decree of October 22d, 1875. The appellants not having, as required by section 997, Revised Statutes, filed any specifications of matters appealed from, it is impossible, of course, to tell what they complain of; but it is so clear that an appeal from the order of January 14th, 1876, would be merely nugatory, that we can safely confine our attention to the appeal as taken from the decree of October 22d, 1875.

The history of the proceedings, as shown from the record, is that on the 16th of December, 1875, while the intervenors were still not parties to the suit, a petition for appeal was presented on behalf of the trustees, complainants below, and refused by the court on the grounds shown in the order annexed. This petition, however, as appears by the record, was never filed in the clerk's office, nor any further step taken in the matter. After the expiration of the sixty days, viz.,

January 6th, 1876, the intervenors petitioned the Circuit Court for leave to intervene for the purpose of appeal as well as to set aside decree. The court refused to set aside or modify the decree, but allowed them to become parties so far as to prosecute the appeal in their own names from the decree of October 22d, 1875. This, however, was under special conditions, viz., that if the intervenors desired the appeal they prayed for to operate as a *supersedeas*, their bond should be for $1,000,000, and be given within thirty days, and if so given it should be regarded as taken and perfected on 16th December, 1875.

Now, as to this order, our contention is—

I. That the order allowing the appeal, if it had been claimed to make such appeal a *supersedeas* thereunder, would have been so far unavailing, even if the bond for $1,000,000 had been given within the thirty days, because the sixty days had already elapsed, and the statutory period having expired, no act of the Circuit Court or any court could enlarge it so as to enable the *supersedeas* to take effect; and the order that it should be regarded as taken within thirty days could not do away with the lapse of time. The recent decision in Kitchen *vs.* Randolph, of this court, so fully settles this, that it seems hardly necessary to add anything further on it, but further reference will be made to this point at a later stage of the argument. The provision of the statute is that writs of error or citations must be not only filed, but served within sixty days.

II. But if we should grant that the court had a right to make such an order, yet, the statutory time having elapsed, their admission of the intervenors to become parties so that they could appeal was solely *ex gratia*, of favor and not of right, and the court therefore had a right in granting this favor to couple it with any conditions or limitations they saw fit. Had the appellants been within the statutory right of appeal, we might concede that the court could not have

limited their right to do so to thirty days, instead of sixty days from the rendition of the decree. But inasmuch as their sixty days had already passed, and inasmuch as they were not parties to the record, so that without the leave of the court they could not have become such so as to have appealed at all, they must take the boon with the *onus* that the court chose to put upon it. Good faith to the court as well as to the parties requires that to have any benefit from the order it should be strictly adhered to. So in the familiar practice in opening judgments, of putting a party upon terms as to speedy trial, admission of certain facts, waiver of technical defenses, &c., there has never been any dispute of the right of the court to impose the same when the party's status is entirely dependent upon the court's grace.

III. If the order of the Circuit Court, however, be treated as creating a valid appeal and the conditions as to time as not binding upon appellants, or it is treated for any reason as if made within sixty days, yet it is clear that Mr. Justice Miller had no authority, on a pending appeal allowed by the Circuit Court, to modify the amount of security required. All the decisions show that this is a matter left absolutely within the discretion of the court below, who, after full hearing, fixed the security on the appeal bond, if to act as a *supersedeas*, at $1,000,000, in open court. This court *in banc* will not modify the amount of security ordered by the judge or court allowing the appeal, unless there has been a change in the status which renders a review necessary, but consider the discretion of the judge allowing the appeal as final.

Black *vs.* Zacharie, 3 Howard, 483.

Jerome *vs.* McCarter, 21 Wallace, 7.

We think it cannot therefore be maintained that a single judge, either of this court or of the Circuit Court, who did not take part in the original allowance of appeal, could at Chambers claim jurisdiction to alter the amount of the *supersedeas* bond fixed by the court below at the time of the allowance.

IV. But all idea on the part of the appellants of relying upon the order of the court, made January 14th, 1876, as an allowance of a valid appeal, on which they could rest, is an afterthought for the purpose of getting rid of the effect of the decision of this court in Kitchen *vs.* Randolph. Before that decision they openly announced that they had not availed themselves of the appeal granted by the court, and in the opinion of Mr. Justice Miller annexed, he states that he regarded the appeal he allowed as a practically new appeal, based on the expiration of the period limited on Judge Dillon's order for taking the appeal, which he regarded, therefore, as defunct. The form of petition directly prayed for an appeal, and the allowance of a *supersedeas* appeal and a citation; and the order made, viz., "the appeal prayed above is hereby allowed, and when the bond I have approved is filed it is to operate as a *supersedeas*," clearly shows that it was regarded in every way as a new appeal, taking effect from that date, February 16th, 1876, and filed February 21st, 1876, as is shown by the endorsement.

This appeal was, therefore, in the intention of the parties applying for it, and of the judge allowing it, a new appeal. Such being the case, it is perfectly clear it falls directly within the decision of this court in Kitchen *vs.* Randolph, since the application to Mr. Justice Miller, instead of being sixty days was nearly four months after the decree.

The words of the act, section 1007, Revised Statutes, are absolutely clear—"In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment or afterward, with the permission of a justice or judge of the appellate

court," and by section 1012 appeals are subjected to the same rules as writs of error. Here there was nothing equivalent to the filing of a writ of error in the clerk's office, viz., the taking or entry of an appeal, or the issuing of a citation, until nearly four months after the decree, viz., the 16th of February, 1876, when, in terms, Mr. Justice Miller, as will be seen by the record annexed, allowed the appeal, and directed it should operate as a *supersedeas*, and awarded a citation.

The decision of this court that the words, "having served his writ of error," &c., are to be taken as an absolute prerequisite is in clear accord with the meaning of the statute and with authority. Reference may be here made, as illustrative, to the decisions of the Supreme Court of Pennsylvania, in the cases of Dennison *vs.* Lerch, 9 Barr, 164; Foreman *vs.* Shricon, 8 Watts & Sergeant, 43; and Black *vs.* Johns, 18 P. F. Smith, 84; where similar words contained in act of 13th June, 1836, section 33, Purdon's Digest, page 44, pl. 15—"If defendant shall not appear at the return day, &c., it shall be lawful for the plaintiff, having filed his declaration, to take judgment thereon for want of an appearance," have been construed by the court as requiring, as an absolute condition precedent to such judgment, that the declaration must have been filed before return day.

This court has held that, even sitting *in banc*, they have no power to dispense with any of the requisites of the act as to a *supersedeas*.

Railroad Company *vs.* Harris, 7 Wallace, 775.

Hutchinson *vs.* Kemp, 18 Howard, 535.

Van Rensselaer *vs.* Kearney, 11 Howard, 297.

Adams *vs.* Lord, 16 Howard, 149.

In the last-named case, Mr. Justice MacLean says that although the mode of entering security and time of perfecting it are matters of discretion, to be regulated by the court, this cannot apply to a case where the appeal operates as a *supersedeas*, when it must be brought strictly within the provisions of the law. The absolute requisite here imposed by law is

that the writ of error or citation shall be served within sixty days from decree. This, it is admitted, has not been done.

V. We may further add, as an additional ground why this order of *supersedeas* cannot avail, that by section 1007 the only party entitled to *supersedeas* is the defendant below. If the intervenors, appellants, desired to take an appeal to operate as a *supersedeas*, they should have asked to be made parties defendant instead of parties plaintiff, and thus not have presented the anomalous position of appealing from a decree in their favor.

R. L. ASHHURST,
J. H. B. LATROBE,
Of Counsel for Appellees.

Supreme Court of the United States.

Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Appellants,

vs.

The Central Railroad Company of Iowa et al., *Appellees.*

October Term, 1876.

No. 731.

APPEAL FROM CIRCUIT COURT FOR THE DISTRICT OF IOWA.

Now, to wit, November 1876, come the Farmers' Loan and Trust Company, complainants below, the Central Railroad Company of Iowa, respondents below, and Thomas Kelso, Isaac Hyde, Jr., Henry M. Jones, Thomas Kensett, John J. Hanson, Charles Alexander, Charles A. Gilson; Edwin M. Lewis, trustee of the estate of Jay Cooke & Co.; Henry G. Timmons, Joseph Wentworth, Edward Fox, John W. Randall, A. Z. Brown, Home for Homeless, York County Savings Bank, Auburn Savings Bank, Camden Savings Bank, Biddeford Savings Bank, Kennebunk Savings Bank, and Maine

Historical Society, holders of bonds secured by the mortgage to foreclose which the bill of complaint in the court below was brought, and by their counsel, appearing specially for the purpose of making this motion, move this honorable court to vacate and set aside the order made on the sixteenth day of February, 1876, by the Hon. Samuel F. Miller, one of the justices of this court and a judge of the said Circuit Court for the District of Iowa, upon petition of the said Russell Sage, James Buell, and N. A. Cowdrey, intervenors, appellants, for a *supersedeas*, directing the stay of all proceedings in this case under the decree therein rendered the 22d of October, 1875.

And for specification of the grounds of this their above motion, the said Farmers' Loan and Trust Company *et al.* show, that it appears by the record in this case, that no appeal was taken by the said Russell Sage, James Buell, and N. A. Cowdrey, or any other party, from the said decree, within sixty days after the delivery of the same, and that, therefore, the said learned justice, whether acting as justice of this court or as judge of said Circuit Court, had no power or authority, under section 1007 of Revised Statutes, or any other law or statute, to permit the said Russell Sage, James Buell, and N. A. Cowdrey to give the security required by law for a *supersedeas*, directing the stay of proceedings under the said decree, or to allow or grant such *supersedeas* after the expiration of sixty days from the rendition of said decree.

And for a further specification of grounds for this their motion, they show here that it appears by the record in this case that in the allowance of appeal made January 14th 1876, by the said Circuit Court, which said appeal was in itself too late to operate as a *supersedeas*, being taken more than sixty days after the rendition of said decree entered October 22d, 1875, it was ordered that such appeal should not operate as a *supersedeas* unless security in the sum of $1,000,000 was given, and the said learned justice, the Hon. Samuel F. Miller, had no jurisdiction, power, or authority to review or alter said order, or to change the amount fixed by said Circuit Court as requisite to make said appeal a *supersedeas*.

DECREE IN COURT BELOW.

The Farmers' Loan and Trust Company, Trustee,	United States Circuit Court for the District of Iowa.
vs.	In Equity.
The Central Railroad Company of Iowa.	October Term, 1875. No. 501.
	Friday, Oct. 22d, 1875.

This cause coming on to be heard upon the pleadings, the proofs taken, and the reports of the master, Lewis M. Fisher, heretofore filed in said cause, and the several parties in interest appearing by counsel. This cause was submitted and taken under advisement by the court, and now said court finds, orders, and decrees—

First.—That the first mortgage in the bill set forth was duly executed and delivered to complainant as trustee for the owners of the bonds therein described, on the fifteenth day of July, 1869' for the purpose of securing the payment, principal and interest, of the certain bonds of said Central Railroad Company of Iowa, amounting in the aggregate to the total sum of $3,700,000.

That default in payment of the interest accruing on said bonds has been made, there being now past due the sum of $623,334.99 up to October 15th, 1875, which amount thus due, together with the principal sum of $3,700,000, forms the first and paramount mortgage now upon the property in the bill described; that default has been made in the performance of the conditions of said mortgage through the non-payment of said interest as aforesaid, entitling complainants to a decree of foreclosure, and the court finds there is due on said mortgage, for principal and interest, the sum of $4,623,334.99 in gold, on the 15th of October, 1875, which now it is ordered that defendant, the Central Railroad Company of Iowa, shall pay in ten days from this date, with seven per cent. interest in gold, from the 15th of October, 1875; and if said defendant

shall not pay the same, then the mortgagees of the second and third mortgage, and said judgment creditors, or any of them, in the order of their respective liens, shall pay the same, and upon such payment, with costs, the said plaintiffs shall satisfy and discharge said mortgage debt, interest, and costs, and in default of said payment by any of said parties their equity of redemption in said premises is forever barred and foreclosed.

Second.—That the second mortgage in the bill described was duly executed and delivered to complainant, as trustee for the owners of the bonds therein described, on the fifteenth day of April, 1871, for the purpose of securing the payment, principal and interest, of the certain bonds of respondent in said mortgage described, amounting in the aggregate to the total sum of $925,000; that there is now justly owing to the holders of said bonds the sum of $1,136,246.86, including principal and unpaid interest up to October 15th, 1875; that the said second mortgage and the bonds secured thereby are a lien upon the property of respondent in said bill described, dating from the said fifteenth day of April, 1871, being next in priority to the lien of said first mortgage hereinbefore described; that said respondent has made default in payment of the interest coming due upon said several bonds secured by said mortgage.

Third.—That the third mortgage in the bill described was executed and delivered by respondent to the complainant, as trustee, on the fifteenth day of May, 1872, for the purpose of securing payment of certain bonds in said mortgage described; that there is now outstanding $420,000 of the bonds secured by said third mortgage.

Fourth.—The court further finds, that with a view to prevent a sacrifice of the mortgaged property by a forced sale, in case of default, it was expressly agreed and stipulated in said first mortgage or trust deed, that in case of any judicial foreclosure sale of the mortgaged property under decree of court,

upon request of a majority of the bondholders the said trustee should purchase the premises in the mortgage described, for the use and benefit of the bondholders; and that upon such purchase the title of said property should vest in said trustee, and that no bondholder should have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed and organized upon such terms, conditions, and limitations and in such manner as the holders of a majority of said outstanding first mortgage bonds secured by said mortgage should in writing request or direct.

That for the purpose of carrying out these promises in said mortgage contained, and in view of the fact found by the master and confirmed by the court that the mortgaged property will not sell in cash for near enough to pay the amount due thereon, and that the several parties in interest, including the first, second, and third mortgage bondholders, general creditors, and stockholders in said Central Railroad Company of Iowa, have united in asking the court to so order the foreclosure and sale of said mortgaged property as to preserve the priority of the first mortgage bondholders and at the same time permit the holders of the other subsequent liens and interests to participate in the benefit of such sale and foreclosure, it is therefore further ordered and decreed, that Lewis M. Fisher be and is hereby appointed a master, for the purpose of making and conducting the sale under the decree of said mortgaged property, the same to be sold under the provisions of said first mortgage in the bill described. The said sale to be made forthwith, in default to pay, as herein decreed, at the front door of the county court-house, in the city of Marshalltown, Iowa,—four weeks' notice of the time and place of said sale to be given by said master, by publishing notice thereof in the *Financier*, New York, and the Des Moines *Register*, and one newspaper published in Marshalltown, Iowa. That such property be sold to the highest bidder, and that the master make full report of his proceedings to this court for

its consideration and approval. The said sale so made by said master not to be deemed to be final until approved by this court.

Fifth.—That the said Farmers' Loan and Trust Company, complainant herein, for the purpose of carrying out the agreement of the parties to said mortgage, is hereby authorized and directed to bid at the sale of said mortgaged property as trustee for the first mortgage bondholders, bidding thereat, at least, the amount of principal and interest of said first mortgage bonds.

That if said trustee as aforesaid shall become the purchaser of said property at such sale, the title shall pass absolutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second, and third mortgage bondholders, creditors, and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage and of this decree, and to be approved by a majority of said first mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders in such manner as the majority of such first mortgage bondholders shall indicate and provide; and in which the second mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second mortgage bonds; and in which corporation the third mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation.

It is further ordered that said trustee shall make full report of its proceedings, under this decree, to this court, and shall submit the conveyance to be made to the new corporation

herein provided for, together with the articles of incorporation of said company, to this court for approval and confirmation.

Sixth.—That if any party, other than the complainant, should become the purchaser of said property at such sale, such purchaser shall deposit with the master, so soon as said property is struck off to him, the sum of $100,000 in gold as earnest money. And if said purchaser shall fail so to do, such failure shall be deemed a withdrawal of his bid, and said master shall forthwith again offer said property for sale under the provision of this decree; that as it is impossible to properly separate said property into parcels, the master is directed to sell the said mortgaged property and everything covered by the mortgage together as an entirety.

Seventh.—That the owners of said second and third mortgage bonds, the general creditors and stockholders of respondents, shall have the right to redeem said mortgaged property at any time within one year from the date of said sale; but if said property is not redeemed within said year from the date of said sale, then the right of redemption of said parties and all of them shall be forever barred and foreclosed. Said redemption herein last named shall be the amount of principal and interest herein named, with ten per cent. interest in gold.

Eighth.—That the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property or any property in the use of said railroad company or any part thereof, by virtue of contracts or cases whereby material, labor, or property has been furnished for or placed upon said defendant's road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties as the same may be established and declared hereafter by this court.

Ninth.—That John N. Rogers be and is hereby appointed special master to ascertain and report to this court the proper and total amount of costs, fees, and expenses attending these foreclosure proceedings, which said costs, fees, and expenses shall be paid out of any funds in the hands of the receiver not otherwise appropriated; and any balance left unpaid shall be a lien upon said mortgaged property in the hands of the trustee, and payment thereof shall be required of said trustee before delivering over said property to any company organized to receive and hold the same under the provisions of the trust deed and of this decree.

(Signed) JOHN F. DILLON,
Judge.

PROCEEDINGS AS TO APPEAL IN CIRCUIT COURT.

The Farmers' Loan and Trust Company	Circuit Court of the United States for the District of Iowa.
vs.	In Equity.
The Central Railroad Company of Iowa and others.	October Term, 1875, to wit, June 10th, 1876.

TO THE HONORABLE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA:

The petition of Russell Sage, James Buell, and N. A. Cowdrey, citizens of the city and State of New York, respectfully shows to this court—

That your petitioners are each of them owners of bonds issued under and purporting to be secured by the first mortgage so called, made by the defendant to the complainant, July 15th,

1869, in trust to secure the payment of the bonds held by your petitioners and others similarly situated; that said bonds held by your petitioners amount in the aggregate to over $200,000, at their face value, exclusive of interest.

Upon information and belief, they aver that the defendant, the Central Railroad Company of Iowa, is wholly and hopelessly insolvent, and its stockholders, from whom alone its directors and other officers originally derived their authority, have no real interest of any value in the property of said corporation, nor in the litigation now before the court, and have no interest in protecting the right of bondholders, and that the other defendants are defendants representing special interest,—not those represented by your petitioners.

Upon information and belief, they aver that several interlocutory proceedings have occurred, seriously affecting the rights and interests of your petitioners as bondholders, and, as your petitioners believe, prejudicial to their rights.

Your petitioners believe and aver that the ends of justice and the due protection of the large amount of property under the management of the court through its receiver require them to state to the court the matters above set forth, and to petition the court for leave to intervene in this suit either as co-plaintiffs or as defendants, as the court may direct, to the end that your petitioners may have opportunity to protect the interest they in common with other holders of bonds issued under said mortgage have; and with liberty to appeal from time to time to the Supreme Court of the United States, from such orders and decrees in this action as may be proper subject of appeal, and with leave to appear upon the taking any testimony in this cause, and upon any application which may be made to the court for any disposition of any part of the property in dispute.

Your petitioners further show to the court that they make this application in good faith and in the belief that it is their duty to present the same, and that the due protection of the interest which they hold and represent requires the same to be granted; and they do not present this petition for the

purpose of delay or for the purpose of making any dilatory motion, application, or opposition in the cause, their own interest and the interest of those they represent being to expedite a speedy hearing and determination of this cause and of all questions involved therein.

Your petitioners therefore pray that the court will make an order giving them leave, in their own right, to intervene in the prosecution or defense of this action as the court may deem most proper for the protection of their interest.

Your petitioners preferring to be made co-plaintiffs, and that the bill of complaint in this cause may be amended by the naming of your petitioners as co-plaintiffs therein, or that your petitioners may have leave of the court to file a supplemental bill, or that if your petitioners are made defendants they may be made defendants as of the time of filing the original bill of complaint in this cause, with leave to use the name of said defendant, the Central Railroad Company of Iowa, or any or either of them, or their own name, or the names of the plaintiffs, for the purpose of obtaining a review of such orders heretofore made as they may desire to have reviewed, and with such leave also to ask for a rehearing upon any such motions or orders as may have been heretofore made in this cause; or that such further or other or different order may be made as to the court may seem meet and the nature of your petitioners' case may require.

(Signed) W. W. COLE,
Solicitor.

NEW YORK, January 15th, 1876.

SOUTHERN DISTRICT OF NEW YORK,
STATE, CITY, AND COUNTY OF NEW YORK. }

Russell Sage, James Buell, and N. A. Cowdrey, being duly and severally sworn, do depose and say, each for himself, that he has read the foregoing petition and knows the contents

thereof, and that the same is true to his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) RUSSELL SAGE,
JAMES BUELL,
N. A. COWDREY.

Sworn to before me, this sixth day of January, 1876.

[SEAL] R. E. STILLWELL,
U. S. Commissioner for the Southern District of New York.

Endorsed—U. S. Circuit Court, District of Iowa. Farmers Loan and Trust Company *vs.* Central R. R. of Iowa and others. Petition of Russell Sage and others for liberty to intervene. By leave of court. Filed January 1st, 1876. GEO. B. CORKHILL, clerk.

The Farmers' Loan and Trust Company, Trustee,

vs.

The Central Railroad Company of Iowa, Hugh Thornton, The Le Grand Quarry Company, Lush, Carton & Co., M. M. St. John, W. H. Moore, N. J. Boardman, C. M. Stewart, Ole Oleson, I. M. Cate, J. S. Gilman, Horace Abbott, Delano Smith, Edwin Willegood, John Turner, and G. W. Maybury.

United States Circuit Court, District of Iowa.

In Equity.

October Term, 1875.

No. 501.

Friday, January 14th, 1876.

And now, on this day, to wit, January 14th, 1876 (it still being of the October Term, 1875), this cause came on for hearing upon the motion of Russell Sage, James Buell, and

N. A. Cowdrey, filed herein January 13th, 1876, to set aside the decree of this court herein rendered October 22d, 1875, which motion, after hearing counsel for and against the same, was by the court denied, to which order the said Sage, Buell, and Cowdrey then and there excepted.

And on the same day, to wit, January 14th, 1876 (it still being of the October Term, 1875), this cause came on for hearing upon the petition of said Russell Sage, James Buell, and N. A. Cowdrey, filed herein January 11th, 1876, stating that they were owners of first mortgage bonds to over $200,000, at their face value, exclusive of interest, and praying to intervene in this suit and become parties thereto.

And upon the petition in behalf of the said Sage, Buell, and Cowdrey by the said Farmers' Loan and Trust Company, trustee and the complainant herein, presented to the Circuit Court judge at St. Paul, December 16th, 1875, as follows:—

"Now comes the Farmers' Loan and Trust Company, as trustee in said cause for Russell Sage, James Buell, and N. A. Cowdrey and plaintiff in said cause, and prays of the court that an appeal may be allowed to said plaintiff, and tenders to the court an appeal bond, with a request that the same may operate as a *supersedeas*" (signed Farmers' Loan and Trust Company, by Grant and Smith, solicitors); and his order thereon, which is as follows:—"In this case an appeal is asked by the complainant so far and only so far as it affects the interests of Russell Sage, James Buell, and N. A. Cowdrey.

"I deny the appeal prayed for, because—

"1. The decree in question was entered by consent of all the parties in interest.

("The term at which this decree was rendered has not yet ended, but stands adjourned until in January next, and the proper course for the parties in whose behalf an appeal is sought is for them to appear, and if the decree is erroneously entered or is improper, to apply to be made parties or to have the decree corrected or a new decree entered.)

"2. An appeal cannot be taken on behalf of certain bondholders not parties to the record, leaving the rest of the decree

unappealed from. As the trustees (complainants) do not ask for an appeal from the whole decree, I need not consider when they would be justified in a case where there are several millions of dollars of bondholders, who acquiesce in the decree, to appeal at the instance of three bondholders who only claim to hold bonds to the extent of $200,000.

"3. If an appeal could be allowed as asked for, the bond offered is insufficient as to amount to secure costs, damages for delay, and costs and interest on the appeal. The clerk will enter the above order of record, denying the appeal prayed for.

"(Signed) JOHN F. DILLON,
"Circuit Judge.

"AT CHAMBERS, ST. PAUL, December 16th, 1875."

Upon consideration of the premises, it is now by the court ordered that Sage, Buell, and Cowdrey be and they are hereby permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein and in their own names, an appeal to the Supreme Court from the decree entered herein on the twenty-second day of October, 1875, and if said Sage, Buell, and Cowdrey desire said appeal to operate as a *supersedeas*, the bond for that purpose is fixed at the sum of $1,000,000, to be given in thirty days from this date, and if so given said appeal shall be regarded as taken and perfected on the sixteenth day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time by order of the judge at chambers, as above shown; but if said appeal is not to operate as a *supersedeas* the bond is fixed at the sum of $2000.

And as to whether the said decree of October 22d, 1875, rendered herein, was a decree by consent, the following are the facts in addition to those appearing on the record and master's reports and the proofs on file, to wit:—

At the said October Term, the complainants herein, viz., the Farmers' Loan and Trust Company, appeared by Solicitor

James Grant, Esq., the Iowa Central Railroad Company by its solicitors, and the other defendants by their attorneys, and there also appeared several attorneys for committees of various bondholders; and all of said parties, the complainants and the defendants, agreed to the decree as entered, the same having been the result of consultation and compromise among the parties in interest, and the same was entered as the result of such agreement, and not upon an independent consideration, by the court, of the rights and equities of the various parties.

The above statement that the complainants consented to said decree is to be taken in connection with the following statement:—The solicitor for the said complainants (to wit, the Farmers' Loan and Trust Company), when the draft of said consent decree was presented to the court by the parties in interest, said to the court that the trustee wished faithfully to execute its trust under the direction of the court; that the trustee had reserved the following communication, which he wished to read, and which was read to the court, to wit:—

To The Farmers' Loan and Trust Company, Trustees, &c. First Mortgage Bondholders:

GENTLEMEN:—We are informed by your counsel, Grant and Smith, that they will ask the court, in the foreclosure suit now pending, to enter such decree as the majority of the bondholders desire, believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names of the first mortgage bonds, to secure the payment of which you hold the mortgage as trustee for ourselves and others similarly situated, this is to notify you of such interest on our part, and to request you to instruct your counsel to procure the *ordinary*

decree of foreclosure and sale, and failing to get this from the court, to take an appeal to the Supreme Court of the United States.

If for any reason you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings and take such course as we may be advised in the matter. We understood the trust deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you to purchase the mortgage premises and to form a new company, that it is competent for you to so do, upon such terms and conditions as a majority of the bondholders desire. But until you do so purchase you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust.*

Respectfully, your obedient servants,

RUSSELL SAGE, $100,000.
F. LEAKE, by RUSSELL SAGE, $25,000.
JAMES BUELL, $10,000.
EDWIN PARSONS, $13,500.

NEW YORK, October 1st, 1875.

And therewith the said solicitor presented the following petition:—

Now comes the Farmers' Loan and Trust Company and say that since they have filed their petition or information as to the application of bondholders to have the said road sold, James Buell has deposited with the said trustees $10,000 in value of first mortgage bonds of said company, Frederick Leake has deposited $25,000 of the same, and Russell Sage $101,000 of the same, and said parties demand of said trustees that they procure a foreclosure of said property under said first mortgage, and the plaintiffs ask the advice of the court in the premises.

GRANT & SMITH,
For the Trustees.

And the said solicitor for the complainant thereupon said to the court that it submitted itself to its advice and direction, and was ready to execute any decree the court might see proper to make, and did not otherwise object to the said proposed decree or give the court to understand that it was or would be objected to by the trustee on behalf of any of the *cestui que trust.*

(Signed) JOHN F. DILLON,
J. M. LOVE.

PETITION FOR APPEAL TO HON. SAMUEL F. MILLER, AND ORDER THEREON.

PETITION OF RUSSELL SAGE, JAMES BUELL, AND N. A. COWDREY, INTERVENORS, FOR AN APPEAL, JANUARY 21st, 1876.

The Farmers' Loan and Trust Company, Complainants; Russell Sage, James Buell, and N. A. Cowdrey, Intervenors,

vs.

The Central Railroad Company of Iowa, Hugh Thornton, The Le Grand Quarry Company, Lush, Carton & Company, C. M. Stewart, M. M. St. John, W. H. Moore, Ole Oleson, H. J. Boardman, I. M. Cate, J. S. Gilman, Horace Abbott, Delano Smith, Edwin Willegood, John Turner, G. W. Maybury.

Circuit Court of the United States, District of Iowa.

TO THE HONORABLE JUDGES OF THE ABOVE-ENTITLED COURT, AND TO THE HONORABLE SAMUEL F. MILLER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Russell Sage, James Buell, and N. A. Cowdrey, all citizens of the city and State of New York, respectfully show to your Honors—

That the above-entitled court made an order or decree at its October Term, 1875, viz., January 14th, 1876, allowing your petitioners to intervene in said case, and to take an appeal, if they so elect, from the decree of that court, made in the above-entitled cause, October 22d, 1875, but continued for further hearing by the presiding justice, by an order made at chambers at the city of St. Paul, December 16th,

1876, which further hearing was had in open court at Des Moines, and determined by the court January 14th, 1876, all of which more fully appears by said order or decree, on file in this court, to which reference is made.

That your petitioners are injured and aggrieved by said order or decree, made October 22d, 1875, and reaffirmed January 14th, 1876, and elect to take an appeal therefrom to the Supreme Court of the United States. They also appeal from so much of said order or decree entered in the above-entitled case as limits their right to be a party in said suit to the right to appeal, as therein named, and to so much of said order or decree as requires your petitioners, if they desire said appeal to operate as a *supersedeas*, to give a bond in the sum of $1,000,000, within thirty days from January 14th, 1876.

Your petitioners aver that the action is to foreclose a railroad mortgage, which mortgage covers the entire property of the defendant, the Central Railroad Company of Iowa. The said railroad company is a bankrupt company, wholly unable to pay its debts; that said court has heretofore appointed its receiver, who is in possession of the entire property of said defendant, and is operating said railroad under and in pursuance of the orders of said Circuit Court.

That there are three mortgages upon the premises, all of which are being foreclosed; that your petitioners are *cestui que trust* of the complainant under the first mortgage; that none of the mortgages have any market or quotable value, except the first mortgage.

That the said first mortgage amounts in the aggregate to the sum of $3,700,000 at its par or face value; that its marketable or salable value does not exceed thirty-five per cent., or say $1,275,000; that sales have been made since the property has been in the hands of the court at twenty-seven and a half per cent.; that the earnings of the road will be applied by the court to the reduction of the amount due on the first mortgage, so that no party to said suit can suffer damages by reason of said appeal.

That the complainants in this case have given their written assent to your petitioners to take this appeal.

Wherefore your petitioners pray for an appeal to the Supreme Court of the United States from said orders and decrees of said Circuit Court, made on said twenty-second day of October, 1875, and on said fourteenth day of January, 1876, as above set forth.

They also ask that said appeal may supersede the execution of said orders or decrees.

Your petitioners herewith offer to your Honors a bond in due form of law, to be approved by you, and pray an allowance of a *supersedeas* appeal and a citation according to law, and your petitioners, as in duty bound, will ever pray.

(Signed) RUSSELL SAGE,
JAMES BUELL,
N. A. COWDREY.

NEW YORK, January 21st, 1876.

CITY AND STATE OF NEW YORK, *ss.*

Personally appeared before the undersigned authority, Russell Sage, James Buell, and N. A. Cowdrey, and each for himself made oath that the foregoing petition is true.

Before me, January 21st, 1876.

(Signed) JOHN A. SHIELDS,
[SEAL] *U. S. Commissioner S. D. of N. Y.*

The appeal prayed above is hereby allowed, and when the bond which I have approved is filed, it is to operate as a *supersedeas.*

(Signed) SAMUEL F. MILLER,
February 16th, 1876. *Judge.*

Endorsed—Circuit Court of the U. S. Farmers' Loan and Trust Company and others, complainants, *vs.* Central Railroad Company and others, defendants. Petition for an appeal. Filed February 21st, 1876. E. R. MASON, Clerk.

The Farmers' Loan and Trust Company, Complainant; Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Complainants,	Circuit Court of the United States, District of Iowa.
vs.	In Equity.
The Central Railroad Company of Iowa and others, Defendants.	No. 501.
	October Term, 1875.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Russell Sage, James Buell, and N. A. Cowdrey, are held and firmly bound unto the clerk of the Circuit Court of the United States for the District of Iowa, in trust for the parties to the above-named suit, as their interest may appear, in the sum of $20,000, lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally.

The condition of this bond is such that, whereas, at a term of the Circuit Court of the United States for the District of Iowa, held on the second Monday of October, 1875, viz., October 22d, 1875, and on the fourteenth day of January, 1876, in the suit above named, depending in said court, in equity, a certain order or decree was made by said court, by which the intervenors in said case were injured and aggrieved, as more fully set forth in their petition, asking for an appeal from said orders and decrees.

And the said intervenors having asked for and obtained an appeal from said orders and decrees to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of the Circuit Court of the District of Iowa, and a citation directed to each of the parties to said suit, citing them to appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1876, having been duly issued and filed.

Now, therefore, if said intervenors, or either of them, shall prosecute said appeal to effect, and answer all damages and costs if said appeal is not made good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals, at the city of New York, this twenty-first day of January, 1876.

RUSSELL SAGE, [SEAL]
JAMES BUELL, [SEAL]
N. A. COWDREY. [SEAL]

Approved by me to operate as a *supersedeas*, this sixteenth day of February, 1876.

SAMUEL F. MILLER,
Judge.

Farmers' Loan and Trust Co., Complainant, Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Complainants,

vs.

The Central Railroad of Iowa and others, Defendants.

Supreme Court of the United States.

OPINION OF ASSOCIATE JUSTICE MILLER UPON APPLICATION TO VACATE APPEAL BOND.

Sur application of H. J. Boardman, chairman of Boston committee of bondholders of Central Railroad of Iowa, to Hon. Samuel F. Miller, Associate Justice Supreme Court, March 7th, 1876, to vacate appeal bond.

HON. HENRY W. PAINE,
HON. J. H. B. LATROBE,
R. L. ASHHURST,
Counsel for Applicants.

N. A. COWDREY,
For Opponents.

OPINION AND JUDGMENT.

In the matter of the application to me at chambers to set aside the order heretofore made by me allowing an appeal to operate as a *supersedeas*, after a full hearing and mature consideration, I overrule the motion.

1. The only ground which goes to the merits on which the motion is founded is, that the sum of $20,000, the amount of the bond approved, is entirely too small to justify a *supersedeas*. Of the sufficiency of the bond, as to amount, I have no doubt.

The whole of this subject was reviewed in the case of Jerome *vs.* McCartee, 21 Wall, 17. The spirit of that decision, and the intent of all the statutes on the subject, is that in case of a foreclosure of a mortgage, or of any judgment for the sale of the property, where that is the principal matter, the bond necessary to appeal with *supersedeas* shall be sufficient to secure costs of suit and such loss by delay as might be reasonably anticipated.

Interest on the debt is not the only criterion, for the debt may be ten times the value of the property; and when the plaintiff could only get the property and no more under the decree, the true criterion is such rent or net proceeds for the use of the property as would fairly accrue to plaintiff pending the litigation.

This is already secured to plaintiff in this case by the fact that the road is in the hands of the court by its receiver, and all it earns pending the appeal, above its necessary expenses, will go to plaintiffs on their debt and interest coupons.

I am reminded that Judges Dillon and Love, who granted the first appeal, required a bond of $1,000,000. They may be of a different opinion from mine, as to what would be the measure of damages on such a bond, and no doubt they thought such a bond necessary; but with my views of the matter I am very clear that $20,000 is sufficient, and if I had any right to act in the matter at all, I am quite satisfied with that action.

2. It is argued that I had no such authority; that the judges of the Circuit Court having, in open court, allowed the parties now appealing to be made parties for the purpose of taking an appeal, and having allowed an appeal on condition of giving bond for $1,000,000, within thirty days, to operate as a *supersedeas*, otherwise in the sum of $2000, their order is conclusive.

Considering the appeal thus granted expired, or *became functus officio*, because no bond was given within thirty days, I granted another appeal after the expiration of this time, fixing the bond at $20,000, to operate as a *supersedeas*. This I suppose I had a right to do under sections 1007 and 1012 of the Revised Statues. If the appeal granted by the judges in open court has expired, I am of opinion that I had the power to do this, and that it was my duty to do it.

But suppose that appeal was still valid, but the right to stay the execution of the decree by giving the bond for $1,000,000 was gone by the expiration of the thirty days, as it certainly was, I am still of opinion that as there was an appeal in existence, that the thirty days allowed by the order of the court, and the sixty days allowed by statute for filing a *supersedeas* bond, had expired, there was a right, under section 1007, in a judge of the Supreme Court, to accept a bond to operate as a *supersedeas*, on application to him after the sixty days had expired. If I have been in error in this, I very much doubt my power to set aside the appeal I have granted or the *supersedeas* which I have ordered. It would be a very dangerous doctrine to hold that an appeal once allowed or a stay once ordered, on an appeal, is always under the control of the judge who allows it.

The case is after a valid appeal pending in the Supreme Court, and if there is no valid appeal, that court will dismiss it, and let the party proceed to enforce the decree.

It is a satisfaction to me that as the Supreme Court has decided that an appeal need not wait until the record is filed, nor even until the term to which the appeal is returnable, to

apply for a dismissal of the appeal, the appellants in these cases can, by a motion to that court, correct my mistake, if I have acted without authority. *Ex parte* Russell, 13 Wall, 664.

SAMUEL F. MILLER,
Associate Justice Supreme Court U. S.

March 10th, 1876.

Mortgage.

THIS INDENTURE, Made this fifteenth day of July, A. D. 1869, at Marshalltown, in the State of Iowa, between the Central Railroad Company of Iowa, a corporation duly and legally incorporated, and existing by and under the laws of the State of Iowa, party of the first part, and the Farmers' Loan and Trust Company of New York, a corporation duly and legally organized, and existing by and under the laws of the State of New York, party of the second part, witnesseth, that

WHEREAS, The said party of the first part is the owner in fee of the railroad extending from Marshalltown, in the State of Iowa, to the village of Ackley, in the said State of Iowa, a distance of about forty-five miles, which line of railroad is now subject to a mortgage, or deed of trust, made by the Iowa River Railway Company, on the twenty-first day of September, A. D. 1868, to Henry L. Stout and L. D. Randall, of Dubuque, Iowa, trustees, in trust to secure the payment of seven hundred and twenty thousand dollars of bonds, all of which bonds are now outstanding, and a valid claim against the party of the first part, the said railroad having been purchased by the said party of the first part from said Iowa River Railroad Company, agreeing in consideration thereof to exchange for said bonds an equal amount of bonds to be

issued in pursuance of this mortgage, as will hereafter more fully appear;

AND WHEREAS, Said party of the first part is the owner in fee of the right of way, depot grounds, and property heretofore owned by the Iowa Central Railroad Company, from the point of junction with the south line of said State of Iowa, in Davis county, to the city of Oskaloosa, in Mahaska county, in said State of Iowa, by purchase and legal conveyance of said property to said party of the first part;

AND WHEREAS, Said party of the first part is desirous of continuing and extending said railroad from Marshalltown to the south line of the said State of Iowa, through the city of Oskaloosa, and from Ackley, in Hardin county, to the north line of said State of Iowa, as near as practicable to the sixteenth meridian of longitude west from Washington, entirely across the said State of Iowa, and equipping the said railroad;

AND WHEREAS, Said party of the first part has entered into a contract with the Iowa Valley Construction Company, a corporation duly organized and existing under the laws of Iowa, by which said last-named company agree to construct said railroad;

AND WHEREAS, Said party of the first part, for the purpose of paying said indebtedness and providing means to pay for constructing the remainder of said railroad as aforesaid, have resolved to issue and deliver bonds to the number of three thousand, of the sum of one thousand dollars each, consecutively numbered from one to three thousand, inclusive, and to the number of two thousand, of the sum of five hundred dollars each, numbered in like manner from one to two thousand, inclusive, amounting to sixteen thousand dollars per mile of railroad now built or hereafter to be built, and not exceeding the aggregate sum of four millions of dollars on the line above named, all of which bonds are duly and

legally made and delivered by said railroad company, party of the first part, and in the form following:—

FIRST MORTGAGE BOND.

STATE OF IOWA.

No. UNITED STATES OF AMERICA. *$1000.*

CENTRAL RAILROAD OF IOWA.

For value received, the Central Railroad Company of Iowa promises to pay to the Farmers' Loan and Trust Company of New York, or bearer, one thousand dollars in United States gold coin, at par, on the fifteenth day of July, in the year eighteen hundred and ninety-nine, with interest, in gold coin as aforesaid, at the rate of seven per cent. per annum, payable semi-annually, free from United States Government tax, on the fifteenth days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the office or agency of said railroad in the city of New York. This bond is one of a series of first mortgage bonds, of five hundred dollars and of one thousand dollars each, to be issued at the rate of only sixteen thousand dollars per mile of single railroad track, ironed and equipped for business by said railroad company. The payment of the principal and interest of said bonds is secured by a deed of trust to the Farmers' Loan and Trust Company, bearing even date herewith, conveying to the said trustee all the railroad of this company located in the State of Iowa, including the road-bed, depot grounds, buildings, right of way, rolling stock, machinery, franchises, and net income acquired and to be acquired by said railroad company, and duly recorded in the several counties in the State of Iowa through which the line of said railroad extends. Any holder of this bond may, after five years, have the same converted into the capital stock of the said railroad company, and be entitled to receive therefor ten shares of the capital stock, on the surrender of this bond, with all the unpaid coupons

thereto annexed. This bond shall not become obligatory until the certificate endorsed hereon is signed by the authorized officer of said Farmers' Loan and Trust Company.

In Witness Whereof, The said railroad company has caused its corporate seal to be hereto affixed, and these presents to be signed by its president and secretary, and countersigned by its treasurer, on this fifteenth day of July, A. D. 1869.

Countersigned.

President.

Treasurer.

Secretary.

Now, therefore, the said Central Railroad Company of Iowa, party of the first part, for and in consideration of the premises and of the sum of four millions of dollars, received to their full satisfaction of said trustee, party of the second part, and for the purpose and with the intent of securing the payment of all of said bonds, with the interest due and to grow due thereon, hath granted, bargained, sold, conveyed, assigned, transferred, and confirmed, and by these presents doth grant, bargain, sell, convey, assign, transfer, and confirm to said Farmers' Loan and Trust Company, of New York, as trustee, and in trust and to their successor or successors, the entire corporate property of the said Central Railroad Company of Iowa, and all its franchises and privileges, constructed or to be hereafter constructed, now held or acquired, or to be hereafter constructed and acquired, extending from a point in Davis county, on the south line of the State of Iowa, at the intersection of said line by the North Missouri Railroad, to Oskaloosa, in Mahaska county, a distance of about sixty miles, along the line formerly owned by said Iowa Central Railroad Company, and thence northerly to Marshalltown; and thence along and including the railroad built by the said Iowa River Railway Company to Ackley, in Hardin county,

and thence northerly to the north line of said State of Iowa, at such point as shall be hereafter definitely determined, including all the rights and franchises of the said Iowa Central Railroad Company, and of the said Iowa River Railway Company; including, also, along the entire line all the right of way acquired by purchase or condemnation, road-bed finished and in process of construction, with all material collected for construction or operative purposes, depots, grounds, gravel-pits, quarries, and real estate, station-houses, water-tanks, repair and machine shops, turn-tables, coal-houses and sheds, and all things of every name and nature belonging to said party of the first part and pertaining to said railroad; also, all machinery, locomotives, and rolling stock, and all tools and supplies heretofore acquired or which may hereafter be acquired by said Central Railroad Company of Iowa; also, the net income of the said party of the first part during the continuance of this trust,—the whole of said property being free and clear from all incumbrances, except the issue of seven hundred and twenty thousand dollars of bonds under the said mortgage to Stout and Randall, trustees, on the railroad from Marshalltown to Ackley, but which bonds are to be exchanged for an equal amount of bonds issued in pursuance of this mortgage; and when that exchange shall be effected in full, then the entire property above described will be free and clear from all incumbrances except that created by this instrument. To have and to hold the above-granted and bargained premises, with the appurtenances thereof, unto the said trustees, and to their successor or successors and assigns in trust, and upon the trust, uses, and purposes hereinafter expressed, of and concerning the same, for the use and benefit of the person or persons, firm or firms, bodies politic or corporate who shall hereafter at any time become the purchasers or holders, owners or bearers of any or either of said bonds, subject to the terms, provisions, and stipulations in said bonds contained, and also subject to the possession and management of said railroad and property by said party of the first part, and its successors and assigns, so long as no

default shall be made in the payment of either interest or principal of said bonds, or in any or either of them, and so long as the said company shall well and truly observe, keep, and perform all and singular the covenants, agreements, conditions, and stipulations in said bonds and in this indenture contained and set forth, and which are to be observed, kept, and performed by and on the part of said company, party of the first part.

It is further agreed by and between the parties hereto, that the said party of the first part shall take up and exchange seven hundred and twenty thousand dollars of the bonds of said Iowa River Railway Company, in pursuance to the terms of the contract with said party of the first part and said Iowa River Railway Company for the purchase of their railway, dated July 22d, 1869, to which reference is made, by giving the holders thereof the bonds secured by this mortgage, in equal amounts, dollar for dollar. And that for the purpose of said exchange it is agreed that the said trustee, party of the second part, may retain seven hundred and twenty thousand dollars of the bonds issued in pursuance of this mortgage, for delivery to the holders of said Iowa River Railway Company bonds, in manner to be hereafter agreed upon between said railroad companies. That the said trustee, party of the second part, shall cancel and discharge each and all of said Iowa River Railway bonds as received in exchange as aforesaid, and make or cause to be made upon each bond a brief note or memorandum, stating when exchanged, in such manner and form as will enable the party of the first part to trace the transaction; and when all of said Iowa River Railway bonds shall have been exchanged and canceled, the mortgage or trust deed upon which they are predicated shall be canceled of record.

And the said party of the first part doth hereby covenant, promise, and agree, for itself, its successors or assigns, to and with the said trustee, their successor or successors, that the said company will well and truly pay each and every of said bonds issued by them and secured by this

mortgage, together with the semi-annual interest to become due thereon, at the rate of seven per cent. per annum, at the times, in the manner, and at the places specified therein, in United States gold coin. And that in case said company shall, for the space of six months, make default in the payment of the said semi-annual interest to become due upon any, either, or the whcle of said mortgage bonds, then, after the expiration of twelve months from the time it became due, and without demand or notice, at the election or option of a majority of the holders of said bonds, the whole principal sum mentioned in each and all of the said mortgage bonds then outstanding shall forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment thereof may at once be enforced.

And it is agreed, in case of the default of the payment of the semi-annual interest, as above provided, that said trustee or its successor is hereby expressly authorized and empowered, upon the request, in writing, of a majority of the owners or holders of said bonds, to enter into and upon, and to take actual possession of, all the property, real and personal, and rights, franchises, and privileges of the premises hereby conveyed, and each and every part thereof, and by their agents or attorneys, have, hold, use, and enjoy the same, and from time to time make all repairs and replacements and all useful alterations, additions, and improvements thereto, as fully as the parties of the first part might have done before such entry, and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same and of every part thereof; and the said trustee and their successor shall and may, and hereby is expressly authorized and empowered to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises, and privileges herein conveyed; said sale shall be either in the city of Marshalltown, Iowa, or in the city of New York. At least three months' notice shall be given of the time and place and terms of said sale, by advertising the same in one or more newspapers of large circulation, in each of the cities of Marshalltown and New

York, and wherever else required by law, and continuing said advertisement at least once a week until the time of sale. And the said trustee may, from time to time, adjourn said sale at discretion, giving reasonable notice of the time and place where it will take place. And as the attorney in fact of the said party of the first part or their successors shall have full power and authority to make, execute, and deliver to the purchaser or purchasers thereof, good, valid, and sufficient deed or deeds, conveyance or conveyances, assignments or transfers, in fee simple or otherwise, of the entire property herein conveyed, and all the rights, franchises, and privileges of the party of the first part or its successors, which conveyance or conveyances, transfer or deeds, shall vest in the purchaser or purchasers all the right, title, interest, and estate whatsoever, reversionary or in possession, or which they may be entitled to receive, have, or hold, of the said company; and said sale shall be a complete and perpetual bar or estoppel, both in law and equity, against said party of the first part, its successors or assigns, and all persons or parties claiming by, from, or under it or them, in anywise or manner whatsoever. The amount of the purchase-money on said sale may be paid and satisfied, in whole or in part, by the outstanding mortgage bonds or any of them secured hereby, and said bonds shall be received in whole or in part payment and satisfaction by said trustee or its successor, according to their value, to be ascertained and determined by the net amount arising from said sale.

And out of the moneys received from said tolls, freights, incomes, rents, profits, and earnings of said railroad and premises, or out of or from the proceeds of said sale, so to be made as aforesaid, after first deducting the expenses, disbursements, cost, charges, and counsel-fees incurred in and about the conducting of said sale, or the working or operating said railroad, including the compensation and commission of said trustee in and about the execution of this trust, and all expenses of repairs, replacements, alterations, additions, and improvements, and all payments for taxes, assessments, charges,

or liens on said premises or any part thereof. The said trustee shall, if the amount secured be sufficient for that purpose, pay said mortgage bonds, or so many of them as shall then be outstanding and unpaid, together with all interest then due upon the same; and if the amount be insufficient, then to divide the same *pro rata* among the outstanding bonds, and the surplus of all such moneys or proceeds of sale, if any there be, shall be paid to said party of the first part, or its assigns or successor.

And it is further covenanted and agreed, by and between the parties hereto, that in case of any judicial foreclosure sale, or other sale of the premises embraced in this mortgage, under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage, shall in writing request the said trustee, or their successor, they are authorized to purchase the premises embraced herein, for the use and benefit of the holders of the then outstanding bonds secured by this mortgage.

And having so purchased said premises, the right and title thereto shall vest in said trustee, and no bondholder shall have any claim to the premises, or to the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation, to be formed for the use and benefit of the holders of the bonds secured hereby, and that said trustee may take such lawful measures as deemed for the interest of said bondholders to organize a new company or corporation for the benefit of the holders of the bonds secured by this mortgage; said new company or corporation shall be organized upon such terms, conditions, and limitations, and in such manner as the holders of a majority of said outstanding bonds secured by this mortgage shall in writing request or direct. And said trustee so purchasing shall thereupon reconvey the premises so purchased by them to said new company or corporation.

And it is further agreed, that the said trustee may appoint and employ, at the expense of the said trust estate, all such

attorneys, counsellors, clerks, bookkeepers, engineers, or other agents as may be reasonably necessary in the execution of any of the trusts herein or hereby declared, and shall not be answerable for the defaults or other misconduct or neglect of such employees, unless chargeable with culpable negligence in the selections. And further, that said trustee shall not be answerable or responsible for anything short of gross negligence or willful defaults in the discharge of the duties of this trust.

And it is further mutually agreed by the parties hereto, that said trustee shall receive from said company for services in the acceptance of this trust, and the signing and delivery of the bonds issued hereunder, the sum of one dollar for each sum of one thousand dollars of bonds thus signed and delivered.

And it is further mutually agreed, that said trustee may be removed from the office of trustee hereunder, by the vote of a majority interest of the holders of said bonds, at any meeting called for that purpose.

And, also, that said trustee may resign this trust, and be thereby discharged from future liabilities thereunder, by a notice of three months, in writing, to said company or its successors.

And the said company, for themselves, their successors and assigns, hereby covenant and agree, for the consideration aforesaid, to execute and deliver any further reasonable and necessary deed or deeds, conveyance or conveyances, to the said trustee, of the property herein described, for the more fully securing the payment of said bonds, particularly for the conveyance of any right, interest, or property acquired by said party of the first part subsequent to the date hereof.

Provided always, and this grant and conveyance is upon the express condition, that upon the payment in full of said bonds, and the interest due thereon, or on the conversion thereof into the stock, in the manner named in said bonds, on exhibiting said bonds, canceled, to said trustee, then the estate, title, and interest of said trustee shall cease, determine, and become void.

And upon request of the said party of the first part, or their successor, the said trustee shall duly execute and deliver a proper release or satisfaction of this mortgage.

In Witness Whereof, The Central Railroad Company of Iowa have caused this indenture to be subscribed in its corporate name by its president and secretary, and have caused its corporate seal to be hereto affixed.

C. C. GILMAN,
President.
CHAS. COLLINS,
Secretary.

[Fifty-cent stamp on each bond for every $500.]

STATE OF IOWA,
HARDIN COUNTY, } *ss.*

Be it Remembered, That on the ninth day of September, 1869, before me, a notary public in and for said State and county, personally appeared Charles C. Gilman and Charles Collins, who are personally known to me to be the identical persons whose names are affixed to the foregoing indenture as respectively president and secretary, and acknowledged the same to be the voluntary act and deed of said Central Railroad Company of Iowa, and they each being by me duly sworn, depose and say, each for himself, that he, Charles C. Gilman, is president, and that he, Charles Collins, is secretary of said railroad company; that they signed the foregoing instrument, as such president and secretary, and caused the corporate seal of said company to be affixed hereto, all as the act and deed of said company, by order and authority of said company, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, the day and year above named.

E. W. EASTMAN,
Notary Public.

[NOTARIAL SEAL]

SUPREME COURT OF THE UNITED STATES.

FARMERS' LOAN AND TRUST COMPANY, Complainants; RUSSELL SAGE, JAMES BUELL, and N. A. COWDREY, Interveners, Complainants,

vs.

THE CENTRAL RAILROAD OF IOWA, Defendants.

Sur Motion to Dismiss Appeal of Interveners.

R. L. ASHHURST
J. H. B. LATROBE,
Of Counsel.

Allen, Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

Farmers' Loan and Trust Company, Complainants; Russell Sage, James Buell, and N. A. Cowdrey, Intervenors, Complainants,

vs.

The Central Railroad of Iowa.

Now, to wit, November 1876, come, by their counsel, the defendants in the suit below and the said complainants, the said The Farmers' Loan and Trust Company, permitting the use of their name under the order of the United States Circuit Court of the District of Iowa, and Thomas Kelso, Isaac Hyde, Jr., Henry N. Jones, Thomas Kensett, John J. Hanson, Charles Alexander, Charles A. Gilson; Edwin M. Lewis, trustee of the estate of Jay Cooke & Co.; Henry G. Timmons, Joseph Wentworth, Edward Fox, John W. Randall, A. Z. Brown, House for Homeless, York County Savings Bank, Auburn Savings Bank, Camden Savings Bank, Biddeford Savings Bank, Kennebunk Savings Bank, and Maine Historical Society, bondholders under the first mortgage on said road, acting in concert and co-operation with the combined committee of bondholders and claiming the right now allowed them of using the name of their said trustee as well as to be heard on their own behalf, and move

to dismiss the appeal allowed by Mr. Justice Miller in the above-entitled cause.

And for specification of the grounds of this motion the said Central Railroad of Iowa and the said Farmers' Loan and Trust Company and others above named, say :—

1. That the said Sage, Cowdrey, and Buell are not parties to the suit in which the decree was made so as to be entitled to maintain an appeal therefrom.

2. That the decree of the court below was by consent and cannot be subject to appeal.

3. That there was another appeal taken and pending when the citation by Mr. Justice Miller was allowed, and he could have no jurisdiction to allow a second one.

4. That neither as judge of the Circuit Court nor as associate judge of the Supreme Court, had Mr. Justice Miller authority to allow this appeal and to issue the order for *supersedeas*, and this irrespective of the questions of the pending appeal.

5. That the decree appealed from is not such a final decree as to be the subject of an appeal.

6. That while it is settled that none but parties taking an appeal can be heard in support of it, any persons interested in sustaining a decree can do so though not parties, and this irrespective of the order of Judge Dillon of October 14th, 1876, directing the Farmers' Loan and Trust Company to permit the use of their name in making this appeal, in compliance with which order they have as aforesaid permitted such use.

RICHARD L. ASHHURST,
JOHN H. B. LATROBE,
For Appellees.

ADDITIONAL REASONS FOR DISMISSAL OF APPEAL.

And now, November , 1876, the said appellees, by their counsel, file, as additional specifications of grounds for this motion, the following:—

I. That the decree appealed from is not, as to the parts thereof from which the appellants appeal, such a final decree as to be the proper subject of appeal.

II. That the said intervenors purport, by their said appeal, to appeal from the whole of the said decree rendered in this case on the 22d of October, 1875, and do not purport thereby to appeal from the same as to their own interest.

III. That the intervenors purport, by their said appeal, to appeal as well from the decree rendered in this case on the 22d of October, 1875, as from the order of court entered January 14th, 1876, allowing them to become parties for the purpose of an appeal, and that such joinder is irregular and improper; and further, if the latter order of January 14th, 1876, be appealed from, the intervenors, by said appeal, disable themselves from maintaining their appeal from said decree, because it is by said order only they are made parties so as to be allowed to appeal.

IV. Because the said order of January 14th, 1876, was, except so far as favorable to the intervenors now appellant, solely interlocutory, and relating to matters entirely in the discretion of the court below, and, therefore, not the subject of an appeal.

V. That the said appeal of the intervenors is otherwise irregular and invalid and insufficient to give to this honorable court jurisdiction to review the action of the court below in this case.

RICHARD L. ASHHURST,
JOHN H. B. LATROBE,
For Appellees.

In the Supreme Court of the United States.

Farmers' Loan and Trust Company, Complainants; Russell Sage, James Buell, and N. A. Cowdrey, Interveners, Complainants,

vs.

The Central Railroad of Iowa, Defendant.

Sur Motion to Dismiss Appeal of Interveners.

BRIEF OF ARGUMENT FOR MOTION.

HISTORY OF THE CASE.

This case arises on a motion made on behalf of the Central Railroad Company of Iowa, defendant in the bill of equity below, and of the following-named holders of bonds, secured by the first mortgage sued upon, viz.:—Thomas Kelso, Isaac Hyde, Jr., Henry N. Jones, Thomas Kensett, John J. Hanson, Charles Alexander, Charles A. Gilson, Edwin M. Lewis, trustee of the estate of Jay Cooke & Co.; Henry G. Timmons, Joseph Wentworth, Edward Fox, John W. Randall, A. Z. Brown, Home for Homeless, York County Savings Bank, Auburn Savings Bank, Camden Savings Bank, Biddeford Savings Bank, Kennebunk

Savings Bank, and Maine Historical Society; and also on behalf of the combined committees of bondholders of the Central Railroad Company of Iowa, representing these and six hundred and forty-nine other bondholders, claiming to use the name of the Farmers' Loan and Trust Company, the trustees in the mortgage and complainants in said bill.

It is conceded that the Farmers' Loan and Trust Company have declined to allow the use of their name for this purpose; but, notwithstanding, the right to use it is claimed on behalf of the committees and the bondholders they represent, on the ground that the decree is a decree in favor of their trustee, and that their trustee declining to take proper measures to sustain the decree, any one interested has a right to do so.

The decree in the above case was entered on the 22d October, 1875, in the form of a decree by consent, as is shown by the special report or statement annexed made by the judges of the court below. The bill had been pending for some two years in said court, and reference had been made to a master, who, after full examination, had made report setting forth *inter alia* the amount of bonds outstanding, and the wishes of the several classes of bondholders. This decree was made by the court, therefore, upon bill and answer and the master's report.

The interveners here, Messrs. Sage, Buell, and Cowdrey, after the decree, applied, on the 16th December, 1875, for leave to appeal in the name of the Farmers' Loan and Trust Company, complainants in the suit, who granted the use of their name for that purpose; but this appeal was refused by Judge Dillon for the reasons shown in his order. On the 11th January, 1876, Messrs. Sage, Buell, and Cowdrey filed in their own names a petition praying to intervene in the suit and become parties, and for leave to appeal. This petition was qualifiedly granted on the 14th January, 1876, and an order made allowing these gentlemen to become so far parties to the suit as to prosecute for the protection of their interests an appeal to the Supreme Court from the decree entered on the 22d of October, 1875, with an additional provision allowing their appeal to operate as a *supersedeas*, if bond for $1,000,000 was given within thirty

days. On the 21st January, 1876, seven days after this order, the same interveners filed, whether in the Circuit Court or in this court it is not clear, a petition addressed to the judges of the Circuit Court for the District of Iowa, and the Hon. Samuel F. Miller, Associate Justice of the Supreme Court of the United States, praying for an appeal to the Supreme Court of the United States from the decree entered 22d October, 1875, and from the order of 14th January, 1876. Upon this petition, his Honor, Mr. Justice Miller, on the 16th February, 1876, issued a citation signed Samuel F. Miller, judge, and with the same signature approved a bond in $20,000 to operate as a *supersedeas*, headed as being taken in the Circuit Court of the United States for the District of Iowa.

Motion is now made to dismiss the appeal so allowed by Mr. Justice Miller on behalf of the railroad company, defendants in the suit below, and of complainants, the Farmers' Loan and Trust Company, whose name we claim a right to use for this purpose, notwithstanding their refusal, on behalf of our clients.

ARGUMENT IN SUPPORT OF MOTION.

We contend that this appeal should be dismissed for the following reasons:—

I. Because the appellants, Sage, Buell, and Cowdrey, are not parties to the suit in which the decree was made.

That none but parties to the decree are entitled to appeal from it, whatever may be the case with regard to a rehearing, seems to be made clear by Ludlow *vs.* Greenhouse, 1 Bligh, N. S., 17; Steel *vs.* White, 2 Paige, 478. So it is laid down in Berry *vs.* The Attorney-General, 2 McN. & Gordon, 16, that a person not a party to the record must first obtain permission from the court below before appealing to a higher court. *Vide*, also, Payne *vs.* Niles, 20 How., 219; Bayard *vs.* Lombard, 9 *id.*, 530.

That the appellants were not parties when the decree was made, October 22d, 1875, is perfectly clear from the record. Their right to appeal must therefore depend on the order of the

Circuit Court, made January 14th, 1876, but this order cannot sustain their appeal.

1. Because it was conditional. They were made parties by the terms of their order for the purpose of taking a particular appeal in a particular manner. The words are " Upon consideration of the premises, it is now by the court ordered that the said interveners be and they are hereby permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the Supreme Court from the decree entered herein on the 22d of October, 1875." They claim now, as shown by their statement of facts as filed before Associate Justice Miller, on the recent application to vacate appeal bond, that they did not avail themselves of the permission to appeal given by the court in its order of January 14th, 1876. If this is the case, and they have not taken this appeal in the manner they were allowed by Judge Dillon in his order of January 14th, they are not parties to the cause, for they were only made parties for the purpose of allowing them to take such an appeal in their own names. And this order was not of right but of grace, for they had been represented at the time of the decree through their trustee, and the sixty days allowed for entering appeal and issuing citation had expired prior to the 11th January, 1876, when they filed their petition to be made parties. If, as they now say, they did not choose to avail themselves of this order of January 14th, their appeal must stand as taken from the original decree of October 22d, as if the order of January 14th had never been made for the allowance of the appeal. The making of the interveners parties to the suit for the purpose of appeal and the allowance of that appeal was one act for one purpose and cannot be divided. The extraordinary pretension of the interveners is to use part of the order so far as to allow them to become parties, and to cast aside the rest allowing them to appeal, and claiming to base a general right of appeal on this special order. In their petition to Mr. Justice Miller to allow the appeal, which they now claim to have taken, they actually ask

to appeal, and the appeal is allowed, not only from the decree of October 22d, 1875, but from the very order of January 14th, 1876, by which alone they are made parties to the suit. It certainly cannot be tolerated that parties should be thus allowed to blow hot and cold, to use an order of the court, made to them of grace and not of right, just so far as convenient, and to cast aside the rest of the order so as to pervert the act of the court entirely from its original purpose.

2. The order making the appellants parties was not justified under the circumstances, but is irregular and void.

(*a.*) There is no pretense of the appellants not being represented in the original position of the suit. The Farmers' Loan and Trust Company, trustees of the mortgage securing their bonds, represented them as well as the other bondholders. There is no pretense whatever of any fraud or collusion, or any absence of knowledge of the proceedings on the part of these interveners. On the contrary, the record directly shows their knowledge and active participation in all the proceedings prior to as well as subsequent to the decree, although they had not chosen to make themselves parties of record before the decree. This decree was entered on bill and answer. There is no contest as to matters of fact, and the only questions involved are matters of law, which can be raised perfectly either by a bill of review or an original bill in the nature of a bill of review. Were there contested questions of fact, which could not, as recently laid down by this court (Putnam *vs.* Day, Leg. Gaz., March 3d, 1876), be considered under bill of review, there might be some ground for contending that the appeal should be allowed; but here the question of the lawfulness of the decree, under the provisions of the mortgage, is one which could be fully heard on a bill of review.

(*b.*) While the court below could, undoubtedly, hear the interveners or any other person claiming a beneficial interest, under the record of plaintiff, on a petition to open or modify their

decree, yet the court below, on the interveners' motion to that effect, filed January 13th, 1876, denied this right to intervene, thereby terminating that application; but then, on the same day, on the petition of the same interveners to be allowed to become parties to the suit for the purpose of taking an appeal, this petition was allowed, and they were made co-plaintiffs with their own trustees, who fully represented them. Now, is it possible for the interveners to be made co-plaintiffs with their own trustees, who fully represented them and the other bondholders, so as to take an adverse position from their co-plaintiffs and appeal from the decree made in favor of their own trustees? While they might have been well made parties plaintiff originally, or at a subsequent time, to support and assist the decree, it is submitted that the only possible position for the court lawfully to place them in, if they opposed the foreclosure, is to make them parties defendant; but even as parties defendant, if they were not in before the decree, how could they lawfully be afterward introduced, and does not such introduction make the interveners' appeal, therefore, an appeal from something which was not the decision of the court below, since the interveners not having taken any independent or adverse position to their trustees, the record-plaintiffs are now appealing from a decree made in favor of those who represented them, because the relief granted was not exactly in the shape they would have preferred?

(*c.*) The Circuit Court could not rightly make these interveners parties for the purpose of allowing their appeal as a *supersedeas*, because at the time of this order, January 14th, 1876, the sixty days allowed had already expired prior to that time. The decree was duly and completely entered October 22d, 1875. Nothing is better settled than that the court cannot alter the date of the decree and cause it to be entered at a more recent date, in order to save an appeal. Caldwell *vs.* Mayor of Albany, 9 Paige, 572. It is the actual, not the nominal, date of entering the decree which governs. Rubber Co. *vs.* Goodyear, 6 Wallace, 153.

Section 1007, Revised Statutes, expressly provides that in any case where a writ of error may be a *supersedeas*, the

defendant may obtain such *supersedeas* by serving the writ of error, &c. within sixty days after the rendering of the judgment complained of; and further, having served his writ of error, as aforesaid, give the security required by law, within sixty days after rendition of such judgment; and here the sixty days absolutely expired prior to December 31st, 1875. It was not competent for the Circuit Court, by any order they might make, to prolong the sixty days, or to order, as they did, that the appeal should be regarded as taken and perfected December 16th, 1875. Further, the appeal was, on the 16th December, 1875, absolutely denied, as is apparent by its terms, and for good reasons, and the suggestion of the court then made was for an application for rehearing within the term, which the interveners actually made, but in which they did not succeed. Granting that it was perfectly competent for the court to keep the matter open for the purpose of making them parties for rehearing, to have the decree corrected, or a new decree entered by that court, they could not and actually did not, at this hearing of December 16th, keep the case open for an appeal for which the time was regulated by statute.

In Edmundson *vs.* Bloomshire, 7 Wal., 306, where an appeal was duly taken but the transcript not filed at the next term, *sec. leg.*, the whole proceeding fell and could not be restored thereafter by an order of court.

II. The appeal cannot be maintained because the decree of the court below was by consent. It is laid down by Daniel, Chanc. Prac., 1540, that a decree or order made by consent of counsel cannot be the subject of appeal. And *vide* cases there cited:—

In Atkinson *vs.* Manks, 1 Cowen, 693, it was held that if the decree purport on its face to have been entered by consent, it will be deemed by the court above to be so; and the appeal dismissed accordingly.

In Monnell *vs.* Lawrence, 12 Johns, 534, it is said that the rule that there can be no appeal taken when the decree appealed

from was entered by consent, was laid down by Lord Hardwick, in 2 Ves., 488, and has since been well recognized.

As to whether or not this is a decree by consent there can be no controversy, since the judges of the court below have not only reported that the decree was entered by the consent of all the parties in interest, but have filed a statement of the facts as actually occurring. The appellants were represented by their trustee, the trustee through their counsel consented, and their counsel further had communication with these interveners before the decree was entered, which communication was submitted to the court, and with this communication before them, the trustees, through their counsel and the approval of the court, did assent to the decree, and the court entered the decree by consent. There is no fraud or mistake shown or pretended. If there was—if the trustees mistook their duty towards bondholders or counsel for the trustees erred—it could have been corrected by a motion to modify or set aside the decree in the court below or by a bill of review filed in the court below by the trustees; or an original bill in the nature of a bill of review, praying to restrain the execution of the decree, might have been filed by the interveners. But the motion to modify or set aside the decree has been refused, and no bill of review, or bill in the nature thereof, has been filed. Does it not seem clear that an appeal is not the proper remedy in such a case?

III. The appeal allowed by Mr. Justice Miller cannot be maintained, because there was another appeal taken and pending, when the citation by Mr. Justice Miller was allowed, and therefore he would have no jurisdiction to allow a second one. The order of the Circuit Court of January 14th, 1876, unconditionally allowed an appeal to the interveners to this court, and the said order was entered in open court. It was, if the order be valid at all, or for any purpose, a complete appeal without citation or further step. Edmundson *vs.* Bloomshire, 7 Wal., 306. This of course irrespective of the question of *supersedeas*. There is nothing better settled than that one appeal cannot be taken while another is pending, even if the first should turn out invalid.

And it is also perfectly clear that a citation is unnecessary when an appeal is taken in open court, but the case is treated as if a citation had been regularly taken out, served, and returned.

IV. Neither as the judge of the Circuit Court, nor as associate justice of the Supreme Court, had Mr. Justice Miller authority to allow this appeal and issue the order for *supersedeas*, and this irrespective of the question of the already-pending appeal.

The record appears to show that he must have acted in the Circuit Court, and since the petition being addressed both to the Circuit Court and to Hon. Samuel F. Miller, Associate Justice of Supreme Court, he signed the citation Samuel F. Miller, judge, and the same signature approved the bond to operate as a *supersedeas*, and the approval of bond is actually entitled as in Circuit Court. That where the word judge instead of justice is used indicates action in the Circuit Court, is shown from the fact that while his title in the Supreme Court is "Justice," his title in the Circuit Court is "Judge."

Vide section 605, Rev. Stat., as to title in Circuit Court, and section 673 as to Supreme Court.

1. If acting in the Circuit Court, it is clear he could not in chambers overrule or nullify the former order of his court made at the regular term in due course. It is true that the act of Congress provides that if the associate justice assigned to the circuit be present at the circuit, and differs in opinion from the circuit judge, his view will govern. Section 650 Rev. Stat. But there certainly cannot be any authority for saying that when not present, he may yet in chambers overrule the order of his colleagues of co-equal jurisdiction, Section 652 Rev. Stat. made in open court.

2. If, however, the associate justice acted as an associate justice of this court, his order to make the appeal a *supersedeas* was equally invalid.

(*a.*) The judiciary act has no provision for making a writ of error or appeal a *supersedeas*, except on the application of the

defendant. The anomalous case is here presented of one who has succeeded in making himself plaintiff by intervention, not only appealing from a decree in favor of the plaintiffs, but asking to supersede its execution.

(*b.*) Because if there were no other appeal pending, and the order of January 14th be treated as either nullified or disregarded, more than sixty days had elapsed from the entry of the decree without the issuing of the citation or taking the other formal steps required. It is true section 1007 provides that if he desires to stay process in the judgment, he may, having served his writ of error, as aforesaid, give the security required by law within sixty days of the rendition of such judgment, or afterwards by permission of the justice of the appellate court; but it is clear that the "afterwards" here only applies to the security. The language is not "he may serve his writ of error and give the security within sixty days or afterwards," but that "he may, having served his writ of error, as aforesaid" (*i. e.*, within sixty days, as prescribed by the former clause), "give the security within sixty days after the rendition of the judgment, or afterwards with permission." Thus, the serving of his writ of error, or here in equity, by analogy, the issuing of the citation or other formal process within sixty days is made an absolute prerequisite, and not liable to be modified by the order of a justice of this court. So, under the old law, it was held, City *vs.* Dennison, 6 Wallace, 495, that a writ not having been perfected eleven days after the rendition of judgment showed a fatal defect. In Telegraph Company *vs.* Eyser, 19 Wallace, 419, [decided in the intermediate position of the law after the amendment to the judiciary act passed in 1872, but before the revision of statutes, and before the insertion of the earlier clause as it now stands, which, in terms, extends time of taking writs of error to sixty days,] all that was ruled was that the change from ten days to sixty days applied by implication to the issuing of the citation or serving the writ of error, as well as to the perfecting of the bond. It cannot be construed as extending the time for issuing the citation so as to make the writ a *supersedeas* beyond the

sixty days. To construe it as so extending would be judicial legislation, not interpretation of the statute, since the terms of the statute make the issuing of the citation an absolute prerequisite. Here there is not room for implication or construction; the words are express, and to be read in connection with final clause of section, that execution shall not issue for sixty days from rendition of judgment.

That there can be no *supersedeas* without a strict compliance with the provisions of the statute has always been held, and this apart from any question of the validity of the appeal.

In Railroad Company *vs.* Harris, 7 Wal., 575, this court expressly held that they had no power to dispense with any of the requisites of the act. And *vide*—

Hudgins *vs.* Kemp, 18 How., 535.

Van Rensselaer *vs.* Kearney, 11 *id.*, 297.

Adams *vs.* Law, 16 *id.*, 149.

In the latter case, decided under the old law, it was held that although in The Dos Hermanos, 10 Wheat., 311, it was ruled that "the mode of taking security and the time of perfecting it are matters of discretion to be regulated by the court," yet "this cannot apply to a case where the appeal operates as a *supersedeas*. It must be brought strictly within the provisions of the law." —Mr. Justice McLean.

If Mr. Justice Miller's order, however, is treated not as granting a new appeal, but as enlarging the time on the old one, which we concede the act of Congress would have allowed a justice of this court to do, he would have no power to modify the amount of security required. It is very clear that this is a matter absolutely in the control of the court below, who, after full knowledge of the circumstances, fixed the appeal bond at a million of dollars, and the decisions of this court seem to show that, except where the status is in some measure changed since the allowance of an appeal, the amount of the appeal bond will not be altered, even by the court, much less can such a modification be made by a single judge thereof.

Black *vs.* Zacharie, 3 Howard, 483.

Jerome *vs.* McCarter, 21 Wallace, 7.

V. The last point to be considered is whether the decree appealed from is such a final decree as to be the subject of appeal. Of course none but a final decree is the subject of appeal. Sec. 691 Rev. Stat.

Now this decree, even if it might be treated as a final one as respects the railroad company defendant, since the foreclosure sweeps away their whole property, which is to be sold at public sale, however it may be bought in under the terms of the decree, is certainly not final as regards the several interests of the bondholders. All their rights must come up on questions of distribution of proceeds of sale, or of confirmation of sale, if the property be purchased by the trustees, which should involve the question of the approval of any form of reorganization adopted under the decree on mortgage. So as to all the questions of detail in the decree, they are matters in discretion of the court below as to what manner of sale will bring the highest price. And an appeal on these points is merely an appeal from discretion of one judge to that of another. This can never be allowed.

Thus the only part of the decree which can be treated as final is the decree of foreclosure. This while the railroad company might appeal from, the appellants cannot, for it is in their favor.

The remainder of decree is interlocutory as means for a realization to the bondholders of the best price or value for their respective interests, whether by sale for cash or by purchase by the trustees with a view to reorganization. Whether or not these provisions are in all respects the wisest are matters of discretion not reviewable, but in any event not until, by a confirmation of a sale and purchase with order of distribution, &c., there is a final decree.

In Beebe *vs.* Russell, 19 Howard, 285, Mr. Justice Wayne lays down the rule that a final decree within the meaning of the act is one which "finally decides and disposes of the whole merits of the cause, and reserves no further questions or discretion for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final

decision," and in that case, the decree having been for a conveyance by defendants, and reference to master to take account of rents due plaintiff and defendant, respectively, the appeal was dismissed.

VI. While it is settled that none but parties taking an appeal can be heard in support of it, any persons interested in sustaining a decree can do so, although not parties. (Daniels' Ch. Prac., 1563; *In re* Stephens, 2 Phil., 563; Foster *ve.* Tyler, 7 Paige, 48.) And our clients are, therefore, entitled to be directly heard on this application.

R. L. ASHHURST,
J. H. B. LATROBE,
Of Counsel.

COPY OF LETTER.

NEW YORK, October 20th, 1876.

R. L. Ashhurst, Esq., Chairman Joint Committee of Bondholders Central Railroad Company of Iowa,

DEAR SIR:—We have received this day an order of the United States Circuit Court for the District of Iowa, a copy of which we annex.

The Farmers' Loan and Trust Company, as such trustee, hereby gives you the permission, right, and privilege which it is directed to give by said order.

Respectfully,

TURNER, LEE & McCLURE,
Attorneys for the Farmers' Loan and Trust Company.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF IOWA.

The Farmers' Loan and Trust Company, Plaintiffs, vs. *The Central Railroad Company of Iowa, Defendants.*	In Equity. Order on motion to remove Trustee, &c.

It is ordered that the trustee shall give its permission to the said Ashhurst and others, the joint committee of bondholders, the right and privilege to use its name for the purpose of making in the Supreme Court a motion to dismiss the appeal, or any other motion which by them may be deemed necessary to fully protect their interests in such appeal.